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Armed Forces Special Powers Act The Debate

Vivek Chadha
Editor

ARMED FORCES SPECIAL
POWERS ACT
The Debate

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PREFACE

The AFSPA provokes strong reactions both in the Northeast as well as Jammu & Kashmir; even though its constitutional validity has been upheld by the Supreme Court. Yet that has not changed the public perception of AFSPA in these states: that it is particularly anti-people and gives the armed forces the licence to act with impunity and commit human rights violations without any accountability. Certain clear cases of human rights violations, where the armed forces have stonewalled all attempts to investigate and punish those who are obviously guilty, have only strengthened the widespread perception that the AFSPA is for the protection of armed forces personnel - and thus encourages human rights violations. A more sensitive approach towards the alleged human right violations would have served to prevent such a perception from taking root.

It must be noted that the AFSPA comes into effect only after the government declares a State, or parts of it, as disturbed. In effect, this means that in the disturbed area, the normal functioning of the government has broken down. And that is why the army is brought in to restore normalcy. I am firmly of the view that in a democracy the army must be employed for a limited period and its deployment cannot be prolonged indefinitely. Unfortunately, it is just the opposite in practice and districts and states continue to be 'disturbed' for years and even for decades. Even a State like Nagaland, continues to be designated as, disturbed, despite the fact that hostilities have been suspended for over a decade and no security personnel have been killed in this period. This, therefore, is only an excuse and an alibi for poor governance, and the failure of the Central and State governments to enforce law and order and provide security to the local population.

There is no doubt that in insurgency and militancy affected areas, provisions must be made for the protection of the armed forces during operations and as such many provisions of the Act are perfectly valid and essential. But in a democracy, public opinion and perceptions must be taken into account when examining whether a particular act needs to be reviewed or even repealed. In this particular case, the government took cognizance of the public sentiments and set up a commission headed by a retired judge of the Supreme Court for reviewing the Act. The Jeevan Reddy Commission, which had a retired general of the Indian army as one of its members, unanimously recommended the repeal of AFSPA and its replacement by appropriate amendments in the UAPA. No final decision on the recommendations has so far been taken by the government giving rise to the widespread perception that, this is because the armed forces have stalled all attempts to not only repeal the Act, but even to bring about any changes. The IDSA should be congratulated for broadening the public debate on this burning issue and suggesting a way ahead to resolve it. I hope the suggestions made will be considered by policy makers with all seriousness and prompt decisions will be taken to restore the credibility of the government of India and of the prime minister, whose assurances on this issue remain unfulfilled more than six years after they were made in Imphal.

G K Pillai

Distinguished Fellow, IDSA

THE DEBATE

Vivek Chadha

There has been a renewed debate over Armed Forces Special Powers Act (AFSPA Annexure I), in the recent months. The course of this debate has witnessed the hardening of positions on the part of the state government in Jammu and Kashmir(J&K), human rights activists, certain non governmental organisations (NGOs) active in J&K and Manipur; and those who support its retention, including political parties, ministry of defence (MoD) and the army. The government has been holding consultations with various stake holders, but a final decision on the issue is still pending.

The strongest opposition has come from J&K, where the AFSPA is seen as a major stumbling block in the way of peace and reconciliation in the region. On the other hand, the army, perceives it is an essential enabling mechanism, to not only ensure peace and security in the state, but also to defeat the proxy war aims of Pakistan.

Over a period of time, substantial efforts have been made to ensure greater accountability and responsibility in the conduct of armed forces while operating under the provisions of AFSPA. The Dos and Don'ts (See Annexure II), formulated by the army as guidelines for operations, were upheld by the Supreme Court, in its judgment on the *Naga People's Movement Against Human Rights etc vs Union of India* case, thereby ensuring adherence to procedural guidelines by the armed forces (See Annexure III). There has been a concerted attempt by the government to ensure that inconvenience

to the people is minimised and that human rights are an operative factor at every level. This has resulted in a significant drop in the complaints relating to human rights violations. However, the embedded perceptions, based on past cases of human rights violations and the alleged incompatibility of the law with human rights, have led to demands for its revocation.

Omar Abdullah, the chief minister of J&K, has been very forthright about his government's desire to revoke the law from the "Srinagar, Budgam, Samba and Kathua districts of the state" because the army has not been conducting operations in these districts for a long time and the districts are "almost militancy free".¹ The chief minister informed the legislators that no formal recommendation had been sent in this regard to the central government, although, in view of the powers vested in the governor, his government was in a position to get it revoked. While accepting the difference of opinion with the army on the issue of revocation, Abdullah also expressed the desire of his government to revoke all laws from the state, that "had lost their relevance". Finally he added that the revocation could not be linked with the maintenance of law and order, since the AFSPA was meant to combat militancy, which had come down to a mere five per cent of 2002 levels.²

In support of his stand, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, on March 30, 2012, also called for the repeal of AFSPA, saying that: "AFSPA allows the state to over ride rights. Such a law has no role in a democracy and should be scrapped."³ The Justice Jeevan Reddy Committee, has also recommended that the Act be revoked. (See key recommendations at Annexure IV).

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1. Firdous Tak, "Partial revocation of AFSPA this year: Omar", *Great Kashmir*, 28 March 2012, <http://www.greaterkashmir.com/news/2012/Mar/29/partial-revocation-of-afspa-this-year-omar-65.asp>, accessed on 17 April 2012.
 2. Ibid.
 3. Anit Anand, "AFSPA should go: UN Rapporteur", *Great Kashmir*, 30 March 2012, <http://www.greaterkashmir.com/news/2012/Mar/31/afspa-should-go-un-rapporteur-54.asp>, accessed on 17 April 2012.

The army however has a different view. The former chief of army staff, Gen V K Singh emphasised that the AFSPA, was a “functional requirement” of the army.⁴

In view of the various shades of opinion IDSA undertook a series of discussions, based on different perspectives of the ongoing debate, in order to arrive at an informed understanding of the issue. The topics included: the historical backdrop; region specific views from J&K and Manipur; the human rights and international humanitarian law perspective; the army’s viewpoint; the legal aspect; and the general perceptions regarding AFSPA.

The papers in this book reflect the opinions expressed by the writers during discussions. In keeping with the complexity of the issue a conscious decision was taken to ask experts to incorporate their individual recommendations in their papers instead of guiding the debate towards a forced consensus.

Historical Backdrop

The first paper, written by Dr Pushpita Das, offers a historical overview of the Act.⁵ It outlines the evolution of AFSPA and its application in various parts of the country, as well as the amendments made during this period.

Views from Affected Areas

Wajahat Habibullah, who has had first hand experience of dealing with challenging issues in Kashmir, , contends that the AFSPA is in violation of Article 21 of the Constitution, which guarantees the right to life. He make a case for the revocation of AFSPA, in its present form, and further argues that if the law has to be retained, it must be changed “in full conformity with the principles of its functioning, including the principles of CrPC, laid down by the Supreme Court.”⁶

4. Gen V K Singh, “AFSPA required by armed forces in certain areas”, *The Indian Express*, 16 April 2012, <http://www.indianexpress.com/news/afspa-required-by-armed-forces-in-certain-areas-gen-v-k-singh/937486/>, accessed on 4 June 2012.

5. Dr Pushpita Das, “The History of Armed Forces Special Powers Act”, pp 10-21.

6. Wajahat Habibullah, “Armed Forces Special Powers Act: Jammu and Kashmir”, pp 22-30.

Pradip Phanjoubam, while supportive of the “near consensus” amongst liberal elements of society for the revocation of AFSPA, also recognises the dilemma of replacing it. In view of the ongoing debate, he stresses the need to “civil(ise) the AFSPA and make it fit to enable future quasi-military policing.”⁷

Human Rights Perspective

Devyani in her chapter puts forward arguments to show how AFSPA contravenes fundamental rights. She concludes that: “In failing to protect and uphold human rights, the Act reinforces a militarised approach to security which has proved to be not only inefficient but, in fact, counterproductive in tackling security challenges.”⁸ She further recommends revocation of the power to shoot-at-sight; adherence “to guidelines on arrest as laid down in the CrPC and the DK Basu judgment; prohibition of use of force while effecting arrest; production of each arrestee before the court within 24 hours; and removal of the immunity clause so people have access to remedies in case of violation.”⁹

It should be noted that many limitations of the law were removed by the legal sanctity accorded to the ‘Dos’ and ‘Don’ts’ by the Supreme Court in the *Naga People’s Movement* case mentioned above. These include: adherence to procedures for arrest; handing over the accused to the police within 24 hours; as well as the upholding of the immunity clause.

Ali Ahmed, in his paper, emphasises that the “provisions of Common Article 3, as incorporated to domestic law” should be implemented in the Indian context, “including suppression of grave breaches.”¹⁰

The Security Forces Perspective

The army’s views, as one of the important stakeholders in the entire debate are based on its perception of the ground realities, particularly

7. Pradip Phanjoubam, “AFSPA is a Demonstration of Poverty of Liberal Imagination”, pp 31-37.

8. Devyani Srivastava, “Rights-based Critique of AFSPA”, pp 64-78.

9. Ibid, p 78.

10. Dr Ali Ahmed, “AFSPA in Light of Humanitarian Law”, pp 79-89.

in the state of J&K. A number of arguments have been given for the retention of AFSPA. *First*, India is fighting a proxy war in the state and, therefore, AFSPA enables the security forces to fight both external and externally-abetted forces that threaten not only the security of the state but also of the country. The encounter on March 28, 2012 in Kupwara, in which five Lashkar-e-Taiba (LeT) terrorists were killed, testifies to this fact. *Second*, the army has its military establishments, intelligence set-up and even convoys that pass through areas where AFSPA is not operative. Therefore, the security of both men and material require the legal safeguards and operational powers of AFSPA. *Third*, cases of hot pursuit could well take troops from areas where the law is in force to where it may have been revoked, thus leading to legal complications, as well as allowing terrorists to create safe havens for themselves. *Fourth*, the army, in its security assessment, sees a rise in terrorist violence in the coming years, given the availability of trained and willing terrorist cadres in Pakistan, who are more over likely to increasingly turn their attention towards India after the de-induction of US-led forces in Afghanistan. Under these circumstances, the army feels that once AFSPA is revoked, political compulsions will not allow its re-introduction even if the situation in the state worsens. The example of Imphal, which has seen a spurt in militant activities since the lifting of the disturbed area status, is cited as proof. Maj Gen Umong Sethi's arguments are based on these premises.¹¹

Lt Gen Satish Nambiar, while highlighting the need for review in view of the domestic perceptions, feels that "It is possible to state with some conviction that in 99 per cent, possibly 99.9 per cent, or maybe even 99.99 per cent cases, our forces take every precaution to ensure that there is no loss of life to innocent civilians or collateral damage to property."¹²

Maj Gen Nilendra Kumar, highlights the need for humanising AFSPA. He recommends a number of measures, within the

11. For a detailed assessment of the army's position see, Major General Umong Sethi (Retd), "Armed Forces Special Powers Act: The Way Ahead", pp 38-56.

12. Lt Gen Satish Nambiar in a written comment to Director General IDSA, Dr. Arvind Gupta, on AFSPA on 8 July, 2012.

constitutional and legal framework of existing laws to build in the necessary checks and balances. A number of these measures stem from the experience of the author and his handling of the AFSPA debate within the army.¹³

The CRPF, is deployed in the hinterland in J&K, also comes within the purview of AFSPA. While its position vis-à-vis the law has not been debated as much as that of the army, K Vijay Kumar, DG CRPF however said that the: “CRPF does not have a stand on the issue, as it will go with the stand of the home ministry..Our only reservation is about the protection the law confers upon us. As long as there is some law, we have no problem.”¹⁴

The Inspector General of Police, Kashmir, in an interview to *FORCE*, preferred to leave the decision to the government: “It is the government’s prerogative to take the decision. I think AFSPA is a complicated issue. One has to appreciate that there is also a question of perception when it comes to the Act.”¹⁵

Public Perception

Shruti Pandalai, in her paper examines the prevailing perceptions with regard to AFSPA. She flags the inability of the army to communicate its point of view, despite misperceptions about the law and the positive contribution made by the army over a period of time. Shruti goes on to suggest the need for a more viable strategic communication strategy for the army in a battle where, at times, reality is replaced by perceptions.

The 24/7 media requires a more proactive and transparent public information environment in the army. It should be reiterated that since laws such as AFSPA are enacted by Parliament, it is primarily the responsibility of the government to communicate with the public over the ongoing debate on AFSPA.

It was evident from the debate that there are no easy answers to the challenges faced. While limitations of AFSPA have been

13. Major General Nilendra Kumar (Retd), “How to Give a Human Face to AFSPA”, pp 57-63.

14. K Vijay Kumar, “Party Time? Not Yet”, *FORCE*, Vol. 9, No 3, November 2011, p 21.

15. S M Sahai, “Should AFSPA be Revoked, our Responsibilities Will Increase”, *FORCE*, Ibid, p 16.

commented upon at length and suggestions made, however, according to Pradip Phanjoubam, no clear alternatives are available. The defence minister, A K Antony, replying to a question in Parliament, indicated that a decision will be taken after carefully considering the opinions of the central and state governments and security forces.¹⁶ Clearly, the need for a consensus on an issue that has far reaching ramifications is a must, lest the law which is meant to protect the people and enable the government to take action against terrorism, leaves the people vulnerable to violence in the wake of serious difference of opinion amongst decision makers.

Keeping the diversity of views on the subject in focus, the recommendations and conclusions of the authors have been included as part of their papers. However, some basic recommendations have also been made in the conclusion, in an attempt to capture the essence of the debate.

The final recommendations have been made based on certain key take aways.

These are:

First, there is a real danger of AFSPA becoming a symbol of oppression and hostage to previous violations if the voices emanating from regions affected by terrorism and insurgency, along with international opinion, are not heard and their grievances redressed.¹⁷ Therefore, status quo is no longer acceptable. Changes, if limited, both in context and content, would be deemed perfunctory and cosmetic by detractors, who will continue to view AFSPA with repugnance.

16. "AFSPA decision after consultation with state, forces: Antony", *The Indian Express*, 12 December 2011, <http://www.indianexpress.com/news/afspa-decision-after-consultation-with-state-forces-antony/886871/>, accessed on 25 June 2012.

17. Pradip Phanjoubam calls AFSPA a "is a raw instrument of war", n 7, p 37. The Jeevan Reddy Committee had termed it as "a symbol of oppression, an object of hate and an instrument of discrimination and high handedness", Report of the Committee to Review the Armed Forces (Special Powers) Act, 1958, 6 June 2005, p 75. <http://www.hindu.com/nic/afa/>, accessed on 15 November 2011. And UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, said that "such a law has no role in a democracy and should be scrapped", *ibid*, n 3.

Second, a message must be sent out to the people of disturbed states like J&K and Manipur that the government is willing to address, both their real and perceived sense of injustice, by making necessary changes to existing laws.

Third, it is evident that existing levels of alienation, arise more from the inadequate enforcement of safeguards in the law. The reduction of human rights cases in 2011 to five, as revealed by Omar Abdullah, which is a substantive improvement from the past years, reinforces the positive impact of implementing existing guidelines and their strict enforcement.

Fourth, the perception seems to have taken root that AFSPA encourages all kinds of human rights violations and consequently, it is the army, that must take the blame. A comparison with the number of custodial deaths in areas not covered by AFSPA, reveals the devil in the details. Between 2001-2010, Uttar Pradesh had 174 police and 2171 judicial custody deaths, while the figure was 250 and 1176 in Maharashtra.¹⁸ If despite these realities, AFSPA, remains the villain then, in addition to its limitations, perception too plays a major role in discrediting the law.¹⁹ It is evident that these perceptions have become the *de facto* if not the *de jure* reality.

Fifth, the army fights low intensity conflicts on the premise that "population" is the "centre of gravity". For the army and consequently for the government to succeed, this mass struggle, requires the people's support to defeat inimical forces. It is for this reason that the winning of "hearts and minds" is considered as an integral part of such operations. If this is accepted then, it also follows that the continued employment of AFSPA in its present form, is only deepening the divide between the people and the army, which by association implies the government. Therefore, conventional logic requires that in the interest of the army and the government, AFSPA must evolve as a new operating mechanism. In fact, this demand should have ideally emanated from the army, whose genuine efforts,

18. Arpit Parashar, "Four custodial deaths daily over the last decade", *Tehelka*, 21 November 2011, http://www.tehelka.com/story_main51.asp?filename=Ws211111HUMAN_RIGHTS.asp, accessed on April 16, 2012.

19. See Shruti Pandalai, "A Case of Perceptions and Losing the Battle of Public Diplomacy", pp 90-97.

in a people centric operational ethos, are being neutralised by the ghost of AFSPA that continues to haunt the present with the historical baggage of the past.

Sixth, the conditions in J&K are peculiar, given that the threat is primarily external, which has a bearing on the nature of the powers and provisions required by troops operating under extremely difficult conditions. To put it simply, an extraordinary situation requires an extraordinary law and therefore, existing laws, which deal with routine law and order issues, will prove inadequate to overcome the challenges faced by the country. However, as the external threat recedes, or when the operations are conducted predominantly in the hinterland, a population centric approach becomes important. It is under these circumstances that the possibility of human rights violations increases. An analysis of past cases, shows that protests follow custodial deaths and fake encounters, in J&K as well as Manipur, and not the fierce encounters on the Line of Control (LoC). Therefore, as the nature of threat varies, so must the approach for the conduct of operations.

It is important to contextualise the debate in order to evolve an effective and acceptable law, which unites the various organs and constituents of the state rather than dividing them. However, this is only possible if the deliberations remain above board, unencumbered by narrow and parochial interests. In the absence of enlightened national interest, irrespective of the nature and provisions of law, its implementation will remain mired in controversy and be guided by short term interests. While internal debate is the strength of any democracy, the internal situation in the country is far too important a factor to be subverted by acrimony and accusations. It is hoped that this publication will enable policy makers take informed decisions on the basis of the suggestions made by the subject experts.

THE HISTORY OF ARMED FORCES SPECIAL POWERS ACT

Pushpita Das

Introduction

In November 2011, the central government extended the Armed Forces Special Powers Act in J&K for another year. The Act was first imposed in the state in 1990 and since then its term has been extended every year by the unanimous agreement of all concerned agencies. This time around, however, the decision to extend the Act met with some opposition. The Intelligence Bureau opposed its extension citing the 'improved' security situation in the state where as both the state government and the Ministry of Defence (MoD) strongly supported its extension. Taking the cue from the state government and the army, the central government declared the whole of Assam a 'disturbed area' and extended the Act for another year.¹

Similarly in March 2012, the Tripura government extended the AFSPA in the state for another six months. The Act, which was imposed in 1997, is presently fully enforced in 34 police stations and partially in six police stations of the state. In the case of Tripura too

1. "Armed Forces Act term extended in State," *The Assam Tribune*, Guwahati, 19 December 2011, at <http://www.assamtribune.com/scripts/detailsnew.asp?id=dec2011/at06>, accessed on 27 March 2012.

the state government opted for the extension of the Act despite clear improvement in the security situation.²

Presently, the Act is in force in Assam, Nagaland, Manipur (except the Imphal municipal area); Tripura (40 police stations); the Tirap and Changlang districts of Arunachal Pradesh and a 20 km belt in the states with a common border with Assam.³ Apart from the Northeast, the AFSPA is also in force in Jammu and Kashmir, which came under its purview on July 6, 1990 as per the Armed Forces (Jammu and Kashmir) Special Powers Act of 1990. Earlier, Punjab was also brought under the Act through the Armed Forces (Punjab and Chandigarh) Special Powers Act of 1983.

The AFSPA is imposed in areas affected by internal rebellion, insurgency or militancy. Since it is a common practice in the country to deploy the armed forces to quell such unrest, this Act provides the armed forces with an enabling environment to carry out their duties without fear of being prosecuted for their actions. The genesis of the Armed Forces Special Powers Act is as follows:

Genesis of the Armed Forces (Special Powers) Act, 1958

The origins of the Armed Forces (Special Powers) Act, 1958 can be traced to the Armed Forces (Special Powers) Act of 1948. The latter in turn was enacted to replace four ordinances—the Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance; the Assam Disturbed Areas (Special Powers of Armed Forces) Ordinance; the East Bengal Disturbed Areas (Special Powers of Armed Forces) Ordinance; the United provinces Disturbed Areas (Special Powers of Armed Forces) Ordinance—invoked by the central government to deal with the internal security situation in the country in 1947.⁴

The Armed Forces Special Powers Act of 1948, as a matter of

2. "Special Powers Act in Tripura extended," *igovernment*, Agartala, 19 March 2012, at <http://www.igovernment.in/site/special-powers-act-tripura-extended>, accessed on 27 March 2012.

3. *Annual Report 2010-2011*, Ministry of Home Affairs, Government of India, New Delhi, 2011, p 17.

4. *Report of the Committee to Review the Armed Forces (Special Powers) Act of 1958*, Ministry of Home Affairs, Government of India, 2005, p 10.

fact, was modelled on the Armed Forces Special Powers Ordinance of 1942, promulgated by the British on August 15, 1942 to suppress the 'Quit India' movement. As the title itself indicates, 'special powers' were bestowed on 'certain officers' of the armed forces to deal with an 'emergency'.⁵ These 'special powers' included the use of force (even to cause death) on any person who does not stop when challenged by a sentry or causes damage to property or resists arrest.⁶ Most importantly, the Ordinance provided complete immunity to the officers; their acts could not be challenged by anyone in court except with the prior approval of the central government.⁷

Incidentally, the Armed Forces (Special Powers) Act of 1948 was repealed in 1957, only to be resurrected a year later in 1958. The context was the fast deteriorating internal security situation in the 'unified Assam'. The Nagas, who inhabited the Naga Hills of Assam and Manipur, had opposed the merger of their area with that of India on the grounds that they were racially and socio-politically different from the Indians. They had even voted in favour of a referendum declaring independence in 1951 and raised the banner of revolt. They boycotted the first general election of 1952, thereby demonstrating their non-acceptance of the Indian Constitution and started committing violent acts against the Indian state.

In order to deal with this rebellion, the Assam government imposed the Assam Maintenance of Public Order (Autonomous District) Act in the Naga Hills in 1953 and intensified police action against the rebels. When the situation worsened, Assam deployed the Assam Rifles in the Naga Hills and enacted the Assam Disturbed Areas Act of 1955, in order to provide a legal framework for the paramilitary forces as well as the armed state police to combat insurgency in the region.⁸

The Assam Disturbed Areas Act of 1955 was a mirror image of

5. *The Armed Forces (Special Powers) Ordinance, 1942*, 15 August 1942, at http://indianarmy.nic.in/Site/RTI/rti/MML/MML_VOLUME_3/CHAPTER_01/452.htm, accessed on March 12, 2012.

6. "Section 2," *The Armed Forces (Special Powers) Ordinance, 1942*, *ibid.*

7. "Section 3," *The Armed Forces (Special Powers) Ordinance, 1942*, *ibid.*

8. Dinesh Kotwal, "The Naga Insurgency: the Past and the Future," *Strategic Analysis*, Vol 24 (4), July 2000, p 751.

the Armed Forces Special Powers Ordinance of 1942 as it gave 'special powers' to the armed forces engaged in counter insurgency. According to Sections 4 and 5 of the Act: "A magistrate or police officer not below the rank of sub-Inspector or havildar in case of the armed branch of the police or any officer of the Assam Rifles not below the rank of havildar/jamadar" had the power to arrest, shoot or kill any person on suspicion. Section 6 of the Act provided protection against any kind of prosecution without the consent of the central government.⁹

But the Assam Rifles and the state armed police could not contain the Naga rebellion and the rebel Naga Nationalist Council (NNC) formed a parallel government—the Federal Government of Nagaland—on March 22, 1956. This intensified the widespread violence in the Naga Hills. The state administration found itself incapable of handling the situation and asked for central assistance. Responding to the appeal of the state government, the central government sent the army to quell the rebellion and restore normalcy in the region.

The President of India promulgated the Armed Forces (Assam and Manipur) Special Powers Ordinance on May 22, 1958 to confer 'special powers' on the armed forces as well as provide them the legal framework to function in the 'disturbed areas' of Assam and the Union Territory of Manipur.¹⁰ A bill seeking to replace the ordinance was introduced in the monsoon session of the Parliament on August 18, 1958. While introducing the Armed Forces Special Powers Bill, the home minister, G. B. Pant, argued that the bill would enable the armed forces to function effectively in a situation marked by arson, looting and dacoity.¹¹

The bill, however, faced some opposition. Several members of Parliament argued that giving such sweeping powers to the armed

9. *The Naga Peoples' Movement for Human Rights vs. the Government of India, The Supreme Court Judgment*, 27 November 1997, at <http://judis.nic.in/supremecourt/helddis.aspx>, accessed on 12 March 2012.

10. *The Armed Forces (Special Powers) Act, 1958* at http://mha.nic.in/pdfs/armed_forces_special_powers_act1958.pdf, Accessed on 13 March 2012).

11. Home Minister G B Pant as quoted in *The AFSPA: Lawless Law Enforcement According to the Law?* (New Delhi: Asian Centre For Human Rights, 2005), p 3.

forces would lead to the violation of the fundamental rights of the people; that it would allow the government to circumvent the Constitution to impose an emergency—without actually declaring it and the armed forces would usurp all the powers of the civilian government; and that it would result in the armed forces committing excesses with impunity. Laishram Achaw Singh, an MP from Manipur, described the bill as a “lawless law”.¹² Nevertheless, after a discussion lasting a total of seven hours, the bill was passed by both the houses of the Parliament with retrospective effect from May 22, 1958. The bill received the President’s assent on September 11, 1958 and was printed in the Statute Book as The Armed Forces (Special Powers) Act, 1958 (28 of 1958).¹³

The Armed Forces (Assam and Manipur) Special Powers Act, 1958

The Armed Forces (Assam and Manipur) Special Powers Act of 1958 was so called because it was enforced in the Naga inhabited areas of the state of Assam and the Union Territory of Manipur. This Act is now popularly referred to as the Armed Forces (Special Powers) Act. The preamble of the Act states that certain special powers are conferred upon the members of the armed forces in the disturbed areas of the state of Assam and the union territory of Manipur. Section 3 of the Act empowered the governor/administrator of the state/union territory to use the armed forces to aid the civilian power if he was of the opinion that the situation was disturbed enough to demand such an action. He could do so by declaring the entire state/union territory, or a part of it, as a disturbed area through a notification in the official gazette. However, it is unclear whether the governor, of a disturbed area has to ask the central government to send in the armed forces or whether the central government on its own can send the army to aid the civil administration once an area has been declared ‘disturbed’.¹⁴

12. Mr. Laishram Achaw Singh, as quoted in *The AFSPA: Lawless Law Enforcement According to the Law?*, *ibid.*

13. *The Armed Forces (Special Powers) Act, 1958*, n 10.

14. *Report of the Committee to Review the Armed Forces (Special Powers) Act of 1958*, n 4, p 13.

As regards 'special powers', Section 4 of the Act confers upon any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces, the power to shoot, kill and arrest without warrant, any person he suspects; as well as enter and search without warrant or destroy any premises he believes are sheltering the rebels. The 'special powers' to open fire, even causing death, however, is not unfettered. It is qualified by two clauses. First, the power to open fire is given in a disturbed area where the assembly of five or more persons or the carrying of weapons is forbidden. Second, if a person is seen as violating such a law.¹⁵

Section 5 of the Act stipulates that any person who is arrested should be handed over to the nearest police station with least possible delay along with the report of his arrest. The 'least possible delay' being, within 24 hours of the person's arrest. Finally, Section 6 provides immunity to the armed forces personnel against arrest or prosecution for anything done or alleged to have been done in the discharge of official duties except after obtaining the consent of the central government.

Comparison with the Armed Forces Special Power Ordinance, 1942

A comparison of the Armed Forces (Special Powers) Act as enacted in 1958 with its predecessor—the Armed Forces (Special Powers) Ordinance of 1942, underscores the fact that the latter Act is indeed more severe. To begin with, the ordinance of 1942 stipulated that a 'competent' officer should be of the rank of a captain or equivalent. This may imply that the British Indian government placed the burden of taking crucial decisions relating to the use of force on a well trained and 'responsible' officer so that the special powers were not misused. The Armed Forces Special Powers Act of 1958 however, lowered the rank of the 'competent' officer to that of a havildar/jamadar, thus allowing almost every soldier to use force with impunity. Devolution of the special powers to the junior officers and its indiscriminate use has had serious socio-political repercussions.

15. *Report of the Committee to Review the Armed Forces (Special Powers) Act of 1958*, n 4, p 15.

Further, the Armed Forces Special Powers Act of 1958 also provides special powers to the armed forces personnel to enter and search any premises without warrant as well as destroy/dismantle any structure, which is suspected to harbour rebels. This was not provided for in the ordinance of 1942.¹⁶

Amendments to the Armed Forces Special Powers (Assam and Manipur) Act, 1958

Envisaged to be enforced only for a period of one year, the Armed Forces Special Powers (Assam and Manipur) Act not only continued to be in force in the Naga-inhabited areas of Assam and Manipur but it was also extended to other areas of the Northeast as well. The coercive tactics employed by New Delhi to force Manipur to accede to India in 1949 and the inadequate provisions made to deal with the famine in Mizoram fostered a sense of alienation among the Manipuris and the Mizos and fuelled insurgent tendencies in the region.

In 1964, the United National Liberation Front (UNLF) demanded the separation of Manipur from the Indian Union and two years later in 1966, the Mizo National Front (MNF) revolted against India. Since the intensity and magnitude of rebellion was severe in the Mizo district, the Assam state government declared the entire Mizo district a disturbed area and the Armed Forces (Assam and Manipur) Special Powers Act was imposed upon it in 1966. In the case of Manipur, however, the Act was imposed in a phased manner—starting from 1970.¹⁷

Meanwhile in Tripura, a tribal movement against Bengali migrants from Bangladesh which began in 1947 further intensified in 1967. By 1970, as the migrant Bengalis started retaliating, the security situation in the union territory worsened. This forced the central government to impose the Armed Forces (Assam and Manipur) Special Powers Act in Tripura in November 1970—a

16. *The AFSPA: Lawless Law Enforcement According to the Law?*, n 12, p 93.

17. Ranjana Mishra, "AFSPA and Human Rights: Its use and Abuse in Manipur", *Think India Quarterly*, p 40, at <http://www.thinkindiaquarterly.org/thinkindiaquarterly/Backend/ModuleFiles/Article/Attachments/RanjanaMishra.pdf>, accessed on 14 March 2012.

unilateral decision, taken without consulting the administrator. The centre's decision of declaring it a disturbed area was not in consonance with the provisions of the Act which did not confer such a power upon it. To address this issue, the Act was amended as the Armed Forces Special Powers (Extension to Union Territory of Tripura) Act in 1970 to enable its enforcement in Tripura.

A year later, the central government passed the North-Eastern Areas (Reorganisation) Act in 1971, which provided for the creation of the states of Manipur, Tripura and Meghalaya and the union territories of Mizoram and Arunachal Pradesh.¹⁸ In view of the central government's unilateral action to declare Tripura as a disturbed area as well as the formation of new states and union territories in the region, the government of India decided to make appropriate amendments to the Armed Forces (Special Powers Act) of 1958. Thus, in 1972, the Armed Forces (Special Powers) Act of 1958 was amended as the Armed Forces Special Powers (Amendment) Act, 1972.

The first amendment was brought in the preamble of the Act, which substituted the words: "in the State of Assam and the Union Territory of Manipur" with the words: "in the States of Assam, Manipur, Meghalaya, Nagaland and Tripura and Union Territories of Arunachal Pradesh and Mizoram".¹⁹ The most important amendment was brought about through Act 7 of 1972, which conferred the power of declaring an area to be disturbed concurrently upon the centre and the state. The argument for this was, that since Article 355 of the Constitution stipulates that the central government: "protect every state against internal disturbance, it is considered desirable that the Central government should also have power to declare areas as 'disturbed', to enable its armed forces to exercise the special powers".²⁰

18. *The North-Eastern Areas (Reorganisation) Act, 1971*, Act No. 81 of 1971, 30th December, 1971, at <http://www.indiankanoon.org/doc/318384/>, accessed on 14 March 2012.

19. *The Armed Forces (Assam and Manipur) Special Powers Act (Amendment) 1972*, at www.amanpanchayat.org/documents/.../afspa_amendment.doc, accessed on 14 March 2012.

20. *Report of the Committee to Review the Armed Forces (Special Powers) Act of 1958*, n 4, p 12.

In 1986, when Mizoram and Arunachal Pradesh were granted statehood, the Act was appropriately adapted to apply to these states as well. In 1990, following large scale violence perpetrated by the United Liberation Force of Asom (ULFA) in Assam, the entire state was declared as a disturbed area and the Armed Forces (Assam and Manipur) Special Powers Act was enforced.

Apart from Northeast India, the Armed Forces Special Powers Act has been imposed in two other states viz. Punjab and Jammu & Kashmir with suitable adaptations. It is important to note here that even though there are slight differences in language and structure, all three Acts are similar in their substance.

The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983

The outbreak of militancy in Punjab in the early 1980s necessitated the imposition of the Armed Forces Special Powers Act in the state. Popular discontentment amongst the Sikhs over religious and linguistic issues had been simmering in Punjab since the late 1960s. Non-resolution of the demands such as a larger share of water for irrigation and the return of Chandigarh to Punjab further intensified the disaffection against the central government. It was however, the espousing of the 'Sikh cause' by the Akali Dal in 1980 and the demand for a separate Khalistan for Sikhs in 1982, that brought matters to a boil.

The struggle for hegemony among various Sikh factions as well as the simultaneous rebellion against the central government worsened the security situation²¹ in the state forcing the Punjab and the Chandigarh governments to declare the whole state as well as the city of Chandigarh as a 'disturbed area' under the Punjab Disturbed Areas Act and the Chandigarh Disturbed Areas Act of 1983. Incidentally, while the Punjab government withdrew the

21. Hamish Telford, "The Political Economy of Punjab: Creating Space for Sikh Militancy", *Asian Survey*, Vol 32(11), November 1992, p 970.

Disturbed Areas Act in 1997, it continues to operate in the union territory of Chandigarh.²²

The central government also promulgated the Armed Forces (Punjab and Chandigarh) Special Powers Act on October 6, 1983 to enable the central armed forces to operate in the state and the union territory. The terms of the Act broadly remained the same as that of the Armed Forces (Assam and Manipur) Special Powers Act of 1972 except for two sections, which provided additional powers to the armed forces. First, a sub-section (e) was added to Section 4 stipulating that any vehicle can be stopped, searched and seized forcibly if it is suspected of carrying proclaimed offenders or ammunition.²³ Secondly, Section 5 was added to the Act specifying that a soldier has the power to break open any locks "if the key thereof is withheld".²⁴ The Armed Forces (Punjab and Chandigarh) Special Powers Act was enforced in the whole of Punjab and Chandigarh on October 15, 1983. It was finally withdrawn from the State 14 years later in 1997, by when the militancy had been decisively dealt with.

The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990

Even as the Sikh militant campaign was reaching its height in Punjab, an armed separatist movement started in Kashmir in 1989. Significantly, the Kashmiri insurgency has both domestic as well as foreign dimensions, which gives it a character of its own. Domestically, the central government's tendency to impose its will on the state without considering the political aspirations of the people had alienated them. Externally, Kashmir has been a bone of contention between India and Pakistan over which both countries

22. "City is still 'disturbed area'," *The Times of India*, Chandigarh, 10 January 2012, at http://articles.timesofindia.indiatimes.com/2012-01-10/chandigarh/30611358_1_punjab-chandigarh-administration-post-of-chief-commissioner, accessed on 29 March 2012.

23. "Section 4 (e)," *The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 (34 of 1983)*, 8 December 1983, at <http://punjabrevenue.nic.in/armsact.htm>, accessed on 28 March 2012.

24. "Section 5," *The Armed Forces (Punjab and Chandigarh) Special Powers Act, 1983 (34 of 1983)*, *ibid.*

have fought four wars.²⁵ Initially, the insurgency was purely indigenous but soon Pakistan started abetting and supporting the insurgents. From the mid-1990s Pakistan also started channelling Afghan war veterans and its own Islamist jihadis to revive the flagging insurgency in the state.

As the situation in the state began to deteriorate, the central government imposed governor's rule in January 1990. In September 1990, the governor invoked the Disturbed Areas Act and the state was declared as disturbed. The Disturbed Areas Act of 1990 was however temporary in nature and remained in force only till July 18, 1992. This was replaced by the Disturbed Areas Act of 1992 which was re-enacted as a Presidential Act.²⁶ Once the state assembly was restored after the 1996 elections, it enacted the Disturbed Areas Act of 1997 and declared the entire state a disturbed area. The Act was however allowed to lapse in 1998.

On September 11, 1990, the central government enacted the Armed Forces (Jammu and Kashmir) Special Powers Act and enforced it retrospectively from July 5 1990. As per the Act stated that the armed forces would be used to aid the civil administration in the disturbed area to prevent terrorist acts directed towards striking terror in the people as well as any activity that endangered the territorial integrity of the country or sought the secession of a part of the territory of India or insulted national symbols such as the Constitution, the national anthem or flag.²⁷ Initially, the Act was enforced in six districts (Anantnag, Baramulla, Badgam, Kupwara, Pulwama and Srinagar) as well as in areas within 20 kms of the line of control in Poonch and Rajouri districts.²⁸ Eleven years later, in

25. Sumit Ganguly and Kanti Bajpai, "India and the Crisis in Kashmir", *Asian Survey*, Vol 34 (5), May 1994, p 403.

26. *Jammu and Kashmir Disturbed Areas Act, 1992 (Act No. 4 of 1992)*, at <http://india.gov.in/allimpfrms/allacts/2154.pdf>, accessed on 29 March 2012.

27. "Section 3 (a) & (b)," *The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990*, at http://mha.nic.in/pdfs/Armed%20forces%20_J&K_%20Spl.%20powers%20act,%201990.pdf, accessed on 29 March 2012.

28. *The Jammu and Kashmir Government Gazette*, Vol 103, Srinagar, July 6, 1990, Civil Secretariat Home Department, Government of Jammu and Kashmir, at http://mha.nic.in/pdfs/Armed%20forces%20_J&K_%20Spl.%20powers%20act,%201990.pdf, accessed on March 29, 2012.

2001, six more districts (Jammu, Kathu, Udhampur, Poonch, Rajouri and Doda) were brought under the purview of the Act.²⁹ The Act continues to be in force in the state despite strong opposition from political and civil society activists.

Conclusion

While it is a fact that the Armed Forces Special Powers Act confers extraordinary powers which have been allegedly misused by the military, police and other paramilitary personnel to commit gross excesses without any fear of being punished, it is also a fact that despite numerous mass protests, legal challenges and review committees the Act has neither being reviewed nor repealed. However, following Supreme Court rulings, some safeguards have been introduced by the army.³⁰ The “Dos and Don’ts” issued by the Army authorities have been suitably amended to conform to the Supreme Court guidelines, which the army personnel are required to strictly follow. For instance, minimum force is used by the armed forces under Section 4(a) against persons suspected of violating prohibitive orders. A person arrested and taken into custody under Section 4(c) is handed over to the nearest police station within 24 hours of such arrest. Any property, arms, ammunition seized by the armed forces is likewise handed over to the officer in charge of the nearest police station. Most importantly, the army has initiated a number of cases against its personnel accused of violating the basic human rights of the people. It is hoped that these safeguards would not only restrain the forces from perpetrating excesses but would also assuage the hurt sentiments of the people in the insurgency affected areas of the country.

29. Notification, Srinagar, 10 August 2001, Civil Secretariat Home Department, Government of Jammu and Kashmir, at http://mha.nic.in/pdfs/Armed%20forces%20_J&K_%20Spl.%20powers%20act,%201990.pdf, accessed on 29 March 2012).

30. Supreme Court of India on Armed Forces Special Powers Act, 1958, *Naga People’s Movement of Human rights, etc., vs. Union of India*, 27 November 1997, New Delhi, at http://www.upr-info.org/IMG/pdf/COHR_IND_UPR_S1_2008anx_Annex_XXIII_Supreme_Court_ruling_on_AFSPA.pdf, accessed on March 29, 2012.

ARMED FORCES SPECIAL POWERS ACT, JAMMU & KASHMIR

Wajahat Habibullah

The continuing application of the Armed Forces Special Powers Act to the State of J&K in the rapidly changing situation has attracted much debate, often heated. Chief Minister J&K Omar Abdullah has in fact announced withdrawal of the application of the law in certain areas, whereas the army has stoutly argued in favour of continuing with the status quo. In a recent decision of the Union Home Ministry in disposing of an appeal filed by the Commonwealth Human Rights Initiative, Joint Secretary K. Skandan, Department of Kashmir Affairs in the Ministry has stated as follows:

“As the matter relating to notification/implementation of this Act was processed by the State Government.... You may, if so desire, approach the State Government for the relevant information under the RTI Act of the State Government. The RTI Act, 2005, is not applicable to the state of J&K; as such, your application was not transferred to the State Government.”

The order says that no guidelines, instructions and rules have been issued by the Ministry regarding implementation of AFSPA in J&K. It states that:

“The Chief Public Information Officer in his letter dated 6th January 2012 informed the applicant that as per the records available.... no such communication has been issued by this

Ministry in relation to implementation of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.”

Earlier, the same applicant had sought information on whether any rule, regulation, instruction, guideline, circular, office memorandum, standing order, standard operating procedure, gazette notification or any other written communication was issued by MHA in relation to the implementation of the controversial law. The MHA disclosure that it has not issued any guideline seemed to run contrary to the Supreme Court directions. In 1997, the Apex Court had laid down a number of dos and don'ts for AFSPA. According to the Supreme Court guidelines, any person arrested and taken into custody in exercise of the powers under Section 4(c) of the Central Act should be handed over to the officer-in-charge of the nearest police station with the least possible delay, so that he can be produced before the nearest Magistrate within 24 hours of such arrest, excluding the time taken for journey from the place of arrest to the court of the magistrate; the property or the arms, ammunition etc., seized during the course of a search conducted under Section 4 (d) of the Central Act must also be handed over to the officer-in-charge of the nearest police station together with a report of the circumstances occasioning such search and seizure.

The other major guideline says that the provisions of the CrPC governing search and seizure have to be followed during the course of search and seizure conducted in exercise of the power conferred under Section 4 (d) of the Central Act; and a complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act shall be thoroughly inquired into.

Pertinently, after the eruption of militancy in the state, AFSPA was imposed in the Valley followed by Jammu respectively in 1990 and 2001. The then Additional Chief Secretary (Home) Mahmood ur Rehman issued a notification, whilst the State was under Governor's Rule, vide SRO-SW4 dated 6-7-1990 declaring the Kashmir valley and parts of Rajouri and Poonch district as disturbed. Another order to notify Jammu region as disturbed was issued by then Principal Secretary Home vide order number 219/97-ISA dated 10-8-2001. The notification declared districts of Jammu, Kathua,

Udhampur, Poonch, Rajouri and Doda as disturbed areas to facilitate the imposition of AFSPA.

The debate around the continuation of the AFSPA has centred around the following issues:

- Complete Revocation of AFSPA.
- Partial Revocation of AFSPA. (Disturbed Area status lifted from certain parts of State)
- AFSPA be amended to include specific safeguards and provisions thereby ensuring that current concerns are met.
- Status quo.
- Application of Ranbir Penal Code, the equivalent of the Indian Penal Code (With additional safeguards for security forces)
- Operate Under Unlawful Activities (Prevention Act) 2008 (With additional safeguards for security forces)

Under the present law the army can shoot to kill under Section 4 (a), for the commission or suspicion of any of the following offenses: acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons, carrying weapons or carrying anything which is capable of being used as a fire-arm or ammunition. To justify the invocation of this provision, the officer need only be *“of the opinion that it is necessary to do so for the maintenance of public order”* and only give *“such due warning as he may consider necessary”*.

The army can destroy property as per Section 4 (b) if it is an arms dump, a fortified position or shelter from where armed attacks are made or are suspected of being made, if the structure is used as a training camp, or as a hide-out by armed gangs or absconders. Besides, the army can arrest anyone- without a warrant under section 4 (c)-who has committed, is suspected of having committed or of being about to commit, a cognisable offense and use any amount of force *“necessary to effect the arrest”*.

Under section 4 (d), the army can enter and search without a warrant to make an arrest or to recover any property, arms, ammunition or explosives which are believed to be unlawfully kept on the premises. This section also allows the use of force necessary for the search.

This means that the AFSPA can be held to be actually in violation of Article 21 of the Constitution, the Right to Life, basic to the Fundamental Rights. This law also overrides the CrPC. The CrPC establishes the procedure for police officers to follow for arrest, searches and seizures, a procedure that the army and other paramilitary are not trained to follow. Hence the apex court's concern that when the armed forces personnel act in aid of civil power; it should be clarified that they may not act with broader power than the police and that these troops must receive specific training in criminal procedure.

While explicating the AFSPA bill in the Lok Sabha in 1958, the Union Home Minister stated that the Act was subject to the provisions of the Constitution and the CrPC. He said "these persons [military personnel] have the authority to act only within the limits that have been prescribed generally in the CrPC or in the Constitution." If this is the case, then why was the AFSPA not drafted to say "use of minimum force" as done in the CrPC? If the government truly means to have the armed forces comply with criminal procedure, then the AFSPA should have a specific clause enunciating this compliance.

Chapter X of the CrPC deals with the maintenance of public order, which provides more safeguards than the AFSPA. Section 129 in that chapter allows for dispersal of an assembly by use of civil force. The section empowers an Executive Magistrate, officer-in-charge of a police station or any police officer not below the rank of sub-inspector to disperse such an assembly. It is interesting to compare this section with the powers that the army has to disperse assemblies under section 4 (a) of the Act. The CrPC clearly specifies the ranks which can disperse such an assembly, whereas the Act grants the power to use maximum force even to non commissioned officers. Moreover, the CrPC does not state that force to the extent of causing death can be used to disperse an assembly.

Sections 130 and 131 of the same chapter set out the conditions under which the armed forces may be called in to disperse an assembly. These two sections have several safeguards which are lacking in the Act. Under section 130, the armed forces officers are to follow the directives of the Magistrate and use as little force as

necessary in doing so. Under 131, when no Executive Magistrate can be contacted, the armed forces may disperse the assembly, but if it becomes possible to contact an Executive Magistrate at any point, the armed forces must do so. Section 131 only gives the armed forces the power to arrest and confine. Moreover, it is only commissioned or gazetted officers who may give the command to disperse such an assembly, whereas in the AFSPA even non-commissioned officers are given this power. The AFSPA, then grants far wider powers than the CrPC for dispersal of an assembly.

Moreover, dispersal of assemblies under Chapter X of the CrPC is slightly more justifiable than dispersal under section 4 (a) of the AFSPA. Sections 129-131 refer to the unlawful assemblies as ones which “manifestly endanger” public security. Under the AFSPA the assembly is only classified as “unlawful” leaving open the possibility that peaceful assemblies can be dispersed by use of force.

Chapter V of the CrPC sets out the arrest procedure the police are to follow. Section 46 sets out exactly how arrests are to be made. It is only if the person attempts to evade arrest that the police officer may use “all means necessary to affect the arrest.” However, subsection (3) limits this use of force by stipulating that this does not give the officer the right to cause the death of the person, unless they are accused of an offence punishable by death or life imprisonment. This power is already too broad. It allows the police to use more force than stipulated in the UN Code of Conduct for Law Enforcement Officials (see section on International law below). Yet the AFSPA is even more excessive. Section 4(a) lets the armed forces kill a person who is not suspected of an offence punishable by death or life imprisonment. And although it cannot be so construed legally, the public is convinced that this has allowed the army to overlook custodial killing of the atrocious kind perpetrated in Machhil, which triggered widespread disturbance in J&K in 2010. In April 2010 three young men, Muhammad Shafi Lone, Shahzad Ahmed and Riyaz Ahmed were killed in what was claimed to have been an armed encounter with terrorists in Machhil, a township nestled in the Kazinag mountain range, close to the LoC, in Kupwara District. Responding to complaints of a fake encounter staged to claim the reward for killing infiltrators, Chief Minister Omar Abdullah asked the police to make enquiry, which in its preliminary

report identified an Indian Army Major as instrumental in the killing of the three who, far from being 'infiltrators' from across the LoC were laborers, residents of Nadihal, in Rafiabad

Under the Indian Penal Code, under Section 302, only murder is punishable with death. Murder is not one of the offenses listed in section 4(a) of the AFSPA. Moreover the 4(a) offences are assembly of five or more persons, the carrying of weapons, ammunition or explosive substances, none of which are punishable with life imprisonment under the Indian Penal Code. Under section 143 of the IPC, being a member of an unlawful assembly is punishable with imprisonment of up to six months and/or a fine. Even if the person has joined such unlawful assembly armed with a deadly weapon, the maximum penalty is imprisonment for two years and a fine. Moreover, persisting or joining in an unlawful assembly of five or more persons is also punishable with six months imprisonment, or a fine, or both. The same offence committed by someone in a disturbed area under the AFSPA is punishable with death. This again violates the Constitutional right to equality before the law. Different standards of punishment are in place for the same act in different parts of the county, violating the equality standards set out in the Constitution.

Because of these features which directly contravene democratic polity there would be a good case made out for the complete revocation of the AFSPA. The changing situation of J&K would, in the opinion of an outsider, also merit such consideration. However, in that state the government continues to persist with its own Public Security Act, 1982 (PSA), a law of more universal application than AFSPA that at the most can be applied to the security forces. This PSA is also the most draconian of its kind in India, although there have been recent amendments to debar its application to minors, a method universally used in the violent demonstrations of 2010.

Even so it can hardly be denied that given the concentration of security forces on both side of the Line of Control, continuing infiltration-even though diminished-and an increasing military presence of the Chinese Peoples' Liberation Army in the northern areas of J&K, there could be a case for continuation of the application of the AFSPA, if the military-the agency tasked with ensuring

security- so judges. If the army therefore feels that it requires continuation of the AFSPA to discharge its responsibilities, no other agency, is qualified to credibly challenge that view. Nevertheless, if it is decided that the operation of the law must continue, it is essential that the process to be followed in applying that law must be spelt out, as in any other law, with details of how the powers conferred by the law are to be exercised. It is by this means that the AFSPA, if it is to be retained, must be brought into full conformity with the principles which must dictate it's functioning, including adherence to the principles of the CrPC, laid down by the Supreme Court. Although the army may have instructions or general orders on how powers must be exercised, these can hardly be a substitute for statutory Rules, enforceable by courts of law in a country which prides itself on the rule of law.

The Army's legal branch is working on formulating rules notified by the law. In order to conform to the Constitution. On the other hand, just as it is the responsibility of the State Government to withdraw its own laws that contravene the principles of democracy, it will also be necessary for the MHA to review its own functioning in relation to the prosecutions permissible under the AFSPA. Members of the military are in any case protected from arrest for anything done within the line of duty under Sec 45 of the CrPC. Section 6 of the AFSPA however provides what amounts to total immunity. To file suit against a member of the armed forces for abuses under the AFSPA, permission must be sought first from the Central Government, which is the MHA. The record shows however that such permission has not been given, even when the case is clearly one of fake encounter established by enquiry by premier investigative agencies of government. The Ministry is committed to reviewing its procedures relating to this. But this is an area that must also be covered by Rules to ensure that permission, if not refused in a given time frame, will be presumed to have been given.

The weight of the argument then must be that the armed forces be convinced by government and representatives of the public of the arguments to rescind the Act, given the protection already extended to them by the existing law. But there is an alternative. The deployment of the army extensively in civilian areas in Kashmir is a hangover frozen along the demands of the war of 1947-48. This

explains why there is heavy deployment in Pattan, on the crossroads between Baramulla and Sopore, in Palhalan, located on the karewa (highland), a natural wall of defence for Srinagar from an advancing land army, and Shalteng, once on Srinagar's outskirts and today a suburb. Clearly, the premier threat today of war between two nuclear armed States is no longer a military assault through a march along the highway from the Punjab on the State capitals Jammu or Srinagar; it is infiltration. If nothing else, that is the lesson of Kargil. For this purpose the army would do well to consider redeployment along the more vulnerable areas along the LoC, in areas with a scattered population comprised mainly of Gujjars migrating seasonally to the highland pastures. Tensions between the army and local civilian populations, which is characteristic of the Valley in these civilian areas, but not along the LoC—where the need for deployment is understood by civilians as necessary for their protection—spring from the feeling amongst civilians that the army is an occupation force, despite laboured efforts by military authorities to dispel such an image. Nor is the army presence here required for maintenance of law and order, for which the army is less and less required to be on call.

Such redeployment will indeed require heavy financial investment. But surely the need for allowing India's citizens in J&K the exercise of fullest constitutional freedoms must be the paramount consideration, as it is the view of this writer that there is no other means of bringing the conflict in the State to closure. A passing reference to any Kashmiri blog on Facebook will substantiate this.¹ And the relinquished military structures can be put to good use as hospitals or other buildings needed for community service, including placement of local police personnel. New construction could then generate employment for Kashmir's masons, carpenters and a host of skilled workers at presently languishing under a regime of high unemployment.

A plan detailing the various means by which areas vacated by the army in the Kashmir Valley can be utilized has been submitted to government, apart from the suggestion for providing hospitals.

1. See Jehangir Ali "Indian 'nationalism': Why Kashmir won't move on" <http://blogs.tribune.com.pk/story/11387/indian-nationalism-y-kashmir-wont-moveon/>

The Kashmiri Diaspora, which is now a prosperous community in the US, the Middle East and parts of South East Asia could be invited to invest. If such a plan were implemented there would be no need to withdraw the AFSPA, which would cease to apply in areas which are without an army presence, except when the army required to be called in.

This said, it must be clearly understood that the final decision on this must rest on the advice of the armed forces. It might be said that the idea of redeployment has in fact originated from amongst army officers that have served in the State, with a high sense of purpose. If, by mutual consultation it is agreed that the law must continue, this must then be subject to review and Rules carefully crafted for its enforcement, which must bring the law into the fullest conformity with the freedoms of every Indian citizen guaranteed to them by no less than the Constitution of India.

AFSPA: A DEMONSTRATION OF THE POVERTY OF LIBERAL IMAGINATION

Pradip Phanjoubam

The Armed Forces Special Powers Act 1958, has always been the focus of any discussion of the problems of Northeast India. Its continuance has indeed become what Giorgio Agamben termed a permanent “state of exception”, during which the civil rights of citizens or a section of citizens of a state are wilfully and severely curtailed by the state. The discussion on the issue is once again on the front burner, after the report of the United Nations Special Rapporteur on extra-judicial, summary or arbitrary executions. Christof Heyns and the Special Rapporteur on Human Rights Defenders, Margaret Sekaggya, in the strongest terms derided the continuance of this Act as a dark blemish on the democratic credentials of India. Following this, the union home minister, P Chidambaram, has even gone on record that a proposal for a reform of the Act is pending with the government. This is welcome.

Even though there is a near consensus in the rights conscious liberal civil society in the country that the Armed Forces Special Powers Act, AFSPA 1958, has outlived its utility, the liberal dilemma as to what must replace the Act continues. It must be added here that even those who believe the Act must continue agree that it remains a choice because there is no other choice, and as soon as the conditions that led to the imposition of this draconian Act recede, the AFSPA would die its natural death.

This argument is not easily refuted, for although the nature of the “extraordinary” situation that prompted the Act to be imposed may have acquired a new visage, there can be no denying that the situation is still “extraordinary”. The important question for the liberal establishment then is, how do they propose this extraordinary situation be tackled? Unless they are able to address this question in earnest and arrive at a satisfactory answer, the hawks who believe there is no substitute for AFSPA, probably will continue to hold the upper hand. In this sense, the continuance of AFSPA is not just about the triumph of illiberal dogmatism, but equally of a profound liberal failure.

But before I go any deeper into what might be a credible liberal strategy, it would be unfair to simply make the pro-AFSPA argument appear legitimate without a challenge, even if it is because of the poverty of liberal imagination. This is because there is a strong element of intellectual coercion in the proposition that the “stick” would disappear the moment the victim behaves. This coercive outlook is a manifestation of the state’s hegemony which says that everything must fall in line with the state’s vision and any serious dissent risks the incurring of its wrath.

The answer to this as proposed by the Italian thinker Antonio Gramsci is “counter hegemony”. Some even go to the extent of arguing that insurgency of the Northeast variety is, or at least was, in many ways this counter hegemony (Prasenjit Biswas and Chandan Suklabaidya in *“Ethnic Life-Worlds in Northeast India”* Sage). All of us in the Northeast, of course, know how oppressive this counter hegemony too can get. But apart from everything else, this dialectic should serve as an eye opener.

Hegemony-counter hegemony, violence-counter violence... the oppressive cycle of the oppression phenomenon can go on and on. The coercion of the AFSPA hence has served to feed the counter coercive reactions of the insurgents and vice versa. Small wonder then that even after 50 years, the situation in the Northeast is still “extraordinary” enough to “deserve” the AFSPA.

The liberal goal should hence be informed by a thirst to find a way to prevent a situation in which another 50 years later, another generation of commentators are left to repeat the dreary chant that

the cycle of violence is destined to go on endlessly. The cycle must be broken somewhere, unfortunately this is not simply the removing of one side of the argument—in this tense dialectic, for the counter argument, as already mentioned, can be equally hegemonic.

This however is not an excuse for the continuance of AFSPA; it is rather a plea for a better liberal argument against the AFSPA. The question “what after the AFSPA?” in this sense is not plain rhetoric as many who dread political incorrectness might make it out to be. It is stark reality. The campaign for the end to AFSPA must continue, but alongside it, in equal earnest, so must also the effort to find a liberal answer to the question “what after AFSPA?” Perhaps the quest for this Holy Grail should be a grand and collaborative project of the civil society and the state.

Although on a much smaller scale, it is not as if such an effort has not been made in India. The Justice Jeevan Reddy Commission report is one such example, but it appears this report will be shelved without officially seeing the light of day. I am not presuming that the recommendations of this report are adequate. I am only saying that such efforts need to be made.

Curiously, nobody, especially the state, wants to describe it as a war situation either—largely—because war implies conflict between two states, making the unenviable paradox of using the military in a civil strife inevitable.

Making Good Laws is the Answer

But the issue of the state’s response to violent challenges to it is multidimensional and indeed the debate on the AFSPA in Manipur, is getting more and more curious on another count. Here we have a peculiar situation where the Act was withdrawn in 2004 in the seven Assembly constituencies in Imphal east and west following the unprecedented public outrage, over the alleged custodial rape and killing of Thangjam Manorama by the Assam Rifles.

And yet, if statistics since 2004 were to be taken into account, it is in this area that most of the state as well as non-state related violence has taken place. What is belied in the process is the widely held public belief that the violence endemic in the Manipur society is conditional to the existence of this draconian and hated piece of

legislation drawn up in 1958 to contain insurgency in those regions of the Northeast that were declared “disturbed”. When the government took the decision to suspend the operation of the Act from the Imphal municipal area, the general belief was that this was the beginning of the end of this Act, and the return of normalcy as a result. Experience however tells a different story.

There is of course confusion in the minds of large sections of the public of Manipur. Many still fail to realise that the AFSPA empowers only the army and central armed police organisations, in particular the Assam Rifles, to take on civil responsibilities while fighting insurgency. While there may be little legitimate objection to this, what is dangerous is the legal immunity that these excessive powers come with. Army and paramilitary personnel acting under AFSPA are not open to the normal legal redress mechanism of a democracy.

The police do not come under AFSPA, but there are enough Acts that give it the powers to deal with the any law and order situation. This confusion shows up every time somebody blames AFSPA for police perpetrated atrocities such as the one at Khwairamband on July 23, in which an unarmed ex-militant was gun down in what is obviously a case of “fake encounter”.

In a remote way though, the arrogant sense of impunity which has become so evident today in the police of the state may be an unhealthy rub off of what we may call the “culture of AFSPA” or the “climate of impunity”. Therefore, with or without AFSPA, the state can be brutal, and it will hit back militarily at anybody or any organisation which challenges it militarily. This being the case, it is not enough for Manipur to merely demand the repeal of the AFSPA and believe this will be the panacea for the violence and all the consequent miseries it has been living with.

The best solution of course would be a political settlement which would resolve the core issues that have fuelled the social unrests, of which insurgency has been the most radical form. But while this is pending, what is called for, as Prime Minister Dr. Manmohan Singh once termed a “humane law”. This, as we see it, would be an Act that empowers the security agencies adequately to deal with the challenges at hand but who are fully accountable to

the normal civil laws. If power corrupts, power without accountability can become monstrous. Manipur knows this too well having been forced by circumstances to tolerate it for decades.

I support the argument that the state has no alternative than to ultimately resort to respond to violent challenges to its integrity and existence with violence, or “legitimate violence” as Max Weber called it. However this state violence will remain “legitimate” only if there are legal frameworks that define “legitimate violence” and its execution. This is why the focus of the debate should be concentrated on the processes and mechanisms for structuring these legal frameworks so as to humanise them, and not on the calls for an unconditional and unprepared removal altogether.

Removing the AFSPA without first having something to replace it may be desirable in a utopian situation where peace is the norm. But in a situation where violent challenges to the state continue, a state not adequately equipped with a suitable legal definition of “legitimate violence” can become extremely dangerous. For then, dictated by the primitive principle of survival that “necessity knows no law”, the state can be predicted to begin hitting back in a lawless vacuum through fiats and ordinances first, and then when matters get more desperate, fake encounters, covert assassinations and intimidations etc. Manipur arguably is in the midst of such a reality already.

Civil(ise) AFSPA

There is one more intriguing question regarding the future of the military in a perfectly democratic world, where wars have become redundant, which should not be left unanswered. On it may indeed hinge on the answers to many of our most immediate and vexed issues. To briefly recap the proposition we have made, let us recall the 2003 UNDP *Human Development Report's* finding that no two countries where democracy has deep roots have gone to war post World War II, implying that democracy other than being a political system which seeks to guarantee equitable power sharing between different sections of the society, is also turning out to be an effective conflict resolution mechanism.

This is extremely significant, considering the rate at which

democracy as a political ideology is spreading. Its natural symmetry, resilience, and the flexibility of its overall architecture which make it possible for it to adjust to the idiosyncrasies of different societies and nations have made it almost an irresistible political phenomenon of the modern times. There is no gainsaying, in the not so distant future it may be the only ideology followed by practically all nations of the world. Allowances for regional variations should naturally be made, but only in form and not in substance that is, fundamental values that Karl Popper famously noted: "Democracy is a system in which the people can change their leaders without the need for bloodshed," would remain intact regardless of form.

Come to think of it, India too has not engaged in any full scale war after the 1971 war with Pakistan for the liberation of Bangladesh. Kargil, was a limited skirmish although intense. If indeed 1971 was the last conventional war, then India has not fought a war for 41 years now. So despite the occasional sabre rattling here and there, not many believe that there would be a full scale war between these neighbours as well.

The fact also is, that the military everywhere is also increasingly beginning to be called upon to aid civil administration to deal with internal unrest. India's case would suffice to demonstrate this. In the last 41 years since the 1971 war, its military's most serious engagements have been for dealing with internal violent political uprisings in Kashmir, Northeast and now in the Maoist heartland. This being the case, it is time for India to begin thinking in terms of reinventing—what everybody acknowledges to be one of the finest military forces in the world—the 1.3 million well-trained fighting fit personnel.

The most aggressive and imperialistic nations, in particular the USA and Israel, still think that the right to belligerence (or the right to declare war on other nations) as still being important. Other than them, in most other democratic countries, such as those in Western Europe, this reorientation of the military, working in convergence with the police for tackling the new challenges before modern military, that of internal security and the new phenomenon of the non-territorial, theological, fundamentalist ideology driven terrorism, has begun. India too must prepare for such a process, for

it too, as we have argued, is heading towards a warless scenario but one dotted with pockets of internal strife. And in tackling internal strife, the language and instruments of wars must be toned down in keeping with civil law keeping measures.

The AFSPA, in this sense is a raw instrument of war. The prime minister, Dr. Manmohan Singh's proposal—made years ago—that the Act must be humanised, was an intuitive anticipation of the future scenario we have just sketched. In tough insurgency situations, the army has been -and still is—called upon to assist the civil administration, and since this being the case the AFSPA in its present avatar appears as an overkill. So then, it is essential to civil(ise) the AFSPA and make it fit for future quasi-military policing.

ARMED FORCES SPECIAL POWERS ACT— THE WAY AHEAD

Umong Sethi

Introduction

The armed forces and the civil society, though part of a common social system, best co-exist in mutually exclusive domains. They come together in adversity and work through it—often adopting unorthodox methods to succeed. Even as the success starts to become a reality, a sense of unease sets in among both in keeping with their behavioural ethos. Civil society seeks to reclaim its natural freedom and space while the armed forces are still in the process of consolidating the gains. At this interim, the leadership has to take deft and pragmatic decisions based on statesmanship to let the civil society benefit from the peace dividend without conceding the advantage gained at a considerable cost.

Over the years India has been facing the challenge of insurgency in some states and has employed the armed forces of the union to contend with it. To combat this very unusual situation, special powers were given to the forces in the form of the Armed Forces Special Powers Act (AFSPA) by the parliament. These powers were granted to the armed forces to effectively retrieve the situation from 'public order domain' to the 'law and order domain' without the fear of the situation slipping back into disorder and to enable normal instruments of democratic governance to become effective again.

The decision of calling in the armed forces to combat insurgency as well as to send them back to barracks, in a democracy, rests with the political leadership. However, any such decision is backed by extensive assessments, reviews, discussions and consultations involving the political leaders, opinion makers, civil services, intelligence agencies, the local police and the armed forces. It is a complex process where different shades of opinion, compulsions, experiences and perceptions are tempered to arrive at a decision. The possibility of the situation deteriorating and becoming worse often imposes caution on the leadership and delays decision making. In case of Jammu & Kashmir (J&K) to a greater extent, and the states in the Northeast, to a lesser extent, the external dimension of the support to inimical forces greatly impacts the decision making process, as regards utility and manner of engagement of armed forces. In both cases the links of the groups operating in the area with anti-national elements operating elsewhere, and their ability to orchestrate terrorist actions in different parts of the country has also been an important consideration for the decision makers.

These inherent complexities have made the process excruciatingly slow resulting in the discourse becoming public. The debate in public domain on continuation of the AFSPA in J&K and in some areas of the Northeast, has often been discordant, with participants taking positions that are either rigidly pro or anti AFSPA, rather than taking a considered view of the implications, timing and manner of its revocation or exploring options and alternatives to suggest a way forward.

The tenor of the debate has created a number of 'impressions'. The dominant being that army has developed a vested interest in operating without worrying about judicial scrutiny and there are groupings that encourage the armed forces to maintain the status quo ante. Another perception is that the army is insensitive to local aspirations and is obstructing the efforts being made to roll back the Act. The arguments at times have been based on past experiences and beliefs that do not take into account changed realities, like the army having refined its modus operandi and the fact that there have been negligible allegations of human right violations over the past few years. Inspired leaks and attempts by opinion makers to use media to either score political points or to create pressure on the

leadership to highlight their point of view or playing to the gallery have contributed to 'impressions' rather than 'facts' being at the core of public discourse. It is another matter that the army also has not done a good job of informing the public at large about the improvements in its conduct of operations, increased internal checks and balances, enhancement in awareness levels of all ranks about local sensitivities and customs, policy of 'zero tolerance' for human rights violations and fair investigation of all reported cases—to name a few.

Preview

The scaffolding on which the arguments hang, consists of four major pillars namely: an understanding of the environment; appreciation of the operational framework analysis of the available alternatives and suggesting a way forward.

Understanding the Environment

There is a general catchphrase that 'the situation in Jammu and Kashmir and in the Northeast has improved' on the basis of various parameters and the relative absence of violence over the past year. Strangely, reduced violence has been construed as lasting peace having returned to the states with little or no chance of the situation tripping. While it is indeed true that the situation has continued to show a trend towards improvement over the last several years, yet the undercurrents that can reverse the trends and a dramatic change remain a possibility.

One of the major reasons for continued insurgency in J&K has been the support it received from the Pakistani establishment and fundamentalist groups that have considerable presence and influence in that country. Despite the recent attempts by the Indian government to re-ignite the dialogue process, Pakistan's basic policy of supporting the 'Kashmir cause' continues and there is no evidence of any 'roll back'. The ability of Pakistan to calibrate violence by orchestrating events is an acknowledged fact. When cornered, Pakistan has made friendly overtures in the past as well. However, this has never blunted its ability to escalate violence against India. Historically, whenever Pakistan discovered that it had a capability,

to exploit a perceived weakness of India it has not hesitated to make full use of it.

In the past year as per Multi-Agency Centre (MAC) figures, 35 attempts were made by 230 terrorists to infiltrate across the Line of Control. Despite the best efforts of the army, 54 of them got through. Intelligence reports suggest that the infrastructure for abetting infiltration remains intact. According to some estimates 700-800 terrorists are waiting to infiltrate into India.¹ Pakistan may have up to 2,500 terrorists in various camps. There is a well-supported network of Over Ground Workers (OGW) within the state and sleeper cells elsewhere in the country. Their ability to foment trouble and create conditions for terrorist actions is a given fact. Media has been reporting for some time about threats to 'Sarpanches' of 'panchayats' to give up their position, which they attained after due democratic process, corroborates the argument.

A few strategic thinkers hold the view that employment of terrorists in conjunction with the army is a part of Pakistan's operational plans. Terrorists and OGWs are considered as strategic assets for creating asymmetry in a conflict situation with India. Encounters with terrorists, recovery of arms, ammunition and IEDs continue albeit at a much reduced level. The terrorists have made their presence felt by targeting people at the places and time of their choosing. As per some estimates approximately 500 of them are currently in the state. Of course many of them are lying low but their presence needs to be acknowledged. Due to its internal dynamics, the international environment and other compulsions, Pakistan has adopted a reconciliatory posture and responded to peace initiatives taken by India. However, the infiltration figures given earlier suggest that the 'proxy war strategy' remains alive. It would be useful to acknowledge that, in the past too, Pakistan has on the one hand made peace overtures and on the other continued the groundwork to target India. The Kargil experience and the Mumbai terrorist strike cannot be ignored. It would be prudent to exercise caution in face of Pakistan's capacity to calibrate violence.

1. Nitin Gokhale, "A Primer on MoD-MHA Differences on AFSPA", *News Warrior*, 12 April 2012, <http://nitinagokhale.blogspot.in/2012/04/primer-on-mod-mha-differences-over.html>, accessed on 20 June 2012.

The argument put forth by a section of the strategic community regarding the impact of events in Afghanistan and their ultimate impact on Kashmir is relevant. This worrying link was established in the late 1980s and early 1990s with the deployment in Kashmir, of a large number of highly indoctrinated Afghan jihadis, following the Soviet withdrawal from Afghanistan. The political situations in Kashmir and Afghanistan may not be related to each other, but in the strategic context both zones of conflict are pieces of the same puzzle.

As US prepares to withdraw from Afghanistan, there are fears of thousands of radicalised and hardened Afghan Jihadis finding their way into Kashmir. This poses serious concerns about peace and stability in the South Asian region and should be a matter of concern for the regional powers and international community.² The director of US National Intelligence James Clapper highlighted that Pakistan considers India as an “existential threat”. In his testimony to the US senate he stated that: “Al Qaeda will increasingly rely on ideological and operational alliances with Pakistani militant factions to accomplish its goals with Pakistan and to conduct transnational attacks.”³ The government of Pakistan has an obligation to follow a Kashmir policy governed by UNCIP resolutions in sync with the aspirations and sentiments of Kashmiris in pursuance of its national interests, as enshrined in article 257 of the constitution of Pakistan.

The internal dynamics of Pakistan need to be taken seriously to understand their implications for J&K and India. The Pakistani nation has been subjected to a culture of sustained violence over a period of time: it has therefore become a way of life. The dictionary meaning of the word “violence” is too inadequate to explain the lawless situation in Pakistan. In Pakistan violence is taking the shape of an expanding industry which involves the Army, the ISI, the terrorist Islamic, ethnic groups, mafias and politicians. There is holy

2. Zafar Choudhary, “In Solidarity with Kashmir” *Rising Kashmir*, 02 Feb 2012, <http://www.risingkashmir.in/news/in-solidarity-with-kashmir-21619.aspx>, accessed on 20 Jun 2012.

3. “Pakistan considers India an existential threat: US”, *The Economic Times*, 1 Feb 2012, http://articles.economictimes.indiatimes.com/2012-02-01/news/31013104_1_mullah-nazir-pakistan-military-leaders-existential-threat, accessed on 20 Jun 2012.

violence, which is basically sectarian, anti-non-Muslims and against the rights of Muslim women. There is State actors-supported "Patriotic" violence as seen in Kashmir and Baluchistan, in Karachi, violence in a great economic activity.⁴ In view of Pakistan's stated objective of pursuing a proxy war against India to secure Kashmir because of the ethnic affinity and water resources, the internal situation in J&K needs some more time to stabilise, before it acquires the capability of withstanding another onslaught.

The union ministry of home affairs conducted a study on the psyche and perceptions of Kashmiri youth in six districts of Kashmir that included Srinagar, Budgam, Anantnag, Kulgam, Baramulla and Bandipora. Extracts of the report published in the press in Kashmir, revealed that the most worrying factor was the disillusionment of the youth with mainstream democratic politics. Only five per cent of them were members of any political party; 12 per cent had voted at least once and 50 per cent of them had never voted. Further, only 9 per cent supported the All Parties Hurriyat Conference. The study highlighted the worrisome phenomenon of the youth not reaching out to any political leader for redressing their problems during a political crisis. The survey highlighted serious concerns among the youth regarding governance, with 67 per cent ranking corruption as the most important issue followed by human rights violations.⁵ The ghastly IED blast in an Alto car at Bijbehara on March 22, 2012 that killed many and injured even more; many encounters with terrorists and selective targeted killings are indicative of the potential of the terrorists to create trouble.

The agitation in 2010 is instructive for evaluating the political environment in J&K. The year started relatively peacefully. By the summer time, frenzy had been created by a calendar of seemingly peaceful protests. The calendar resulted in a vicious cycle of bandhs,

4. Samuel Baid, "Pak Children Growing in Violence, Terror and Government Indifference", *Kashmir Images*, 03 February 2012, <http://dailykashmirimages.com/news-pak-children-growing-up-in-violence-terror-and-government-indifference-20568.aspx>, accessed on 20 June 2012.

5. Anil Anand, "Kashmiri Youth Indifferent to Mainstream Politics: Study", *Greater Kashmir*, 3 February, 2012, <http://www.greaterkashmir.com/news/2012/Jan/27/kashmiri-youth-indifferent-to-mainstream-politics-study-36.asp>, accessed on 20 Jun 2012.

violence, police action leading to deaths of civilians, leading to more bandhs and violence in the Valley. It is believed in some quarters that forces from across the border played a significant role in orchestrating the violence, coordinated at the ground level by their protégés in the Valley. Some terrorist groups were also alleged to have coerced people to perpetuate violence. Despite the heavy presence of CAPFs and local police, the situation became alarming and the state government had no option but to call in the army to conduct flag marches in Srinagar city, where it had not operated for decades. Alongside, the army had to: re-deploy additional resources to keep the national highway open for movement; support the CAPFs and police; ensure the smooth progress of the on-going Amaranth yatra; besides maintaining vigil along the LC and conducting the counter insurgency campaign.

The issues of governance, corruption, employment and the crying need to be treated with dignity are the major concerns that are yet to be fully addressed. Therefore, the triggers for peaceful agitations turning quickly violent remain and provide an opportunity for the sleeper cells/terrorists to exploit the situation and make it awkward and difficult for the local authorities to handle by themselves. This brief analysis of the environmental realities indicates a clear and present danger which must be taken cognizance of, while deciding future course of action.

The Framework

The two conditions that are necessary for the army to effectively operate in an insurgency or terrorist situation are: the requisite freedom of action and second, be safeguarded against motivated investigations and being prosecuted for the legitimate actions undertaken in good faith, while conducting operations. Freedom of action involves allowing it certain police powers such as search, seizure, arrest and the conduct of follow up operations. These powers available to the army under the AFSPA are still limited when compared to wider powers of the local police under CrPC or the Ranbir Penal Code (RPC applicable in J & K) that include preventive detention, summoning of witnesses, search, seizure and arrest.

It is necessary to understand the graph of insurgency and its effect on governance and civil society to appreciate why the army

needs to be protected from harassment, arrest and prosecution. To start with, as terrorism up scales to insurgency, the influence of the government wanes, the polity is marginalised along with the increase in influence of the insurgents. There is a tendency amongst the weakened leadership to encourage the locals and media, to highlight the perceived wrong doings of the security forces (SF) to show that it still has some modicum of control. During the insurgency phase, pressure is exerted on the populace by the insurgents to project the security forces in a bad light by highlighting fabricated allegations. Absence of effective governance and weak institutions do not allow the cases to be investigated. As the insurgency declines, the tendency of highlighting the perceived excesses by security forces resurfaces among politicians, opinion makers and civil authorities to reclaim political space. The number of allegations and decibel levels increase exponentially with improvement of the situation without any reference to fact, to score points and exploit emotions.

Some journalists have investigated the pending cases in a few police stations in highly terrorist infested areas. According to their findings, the FIRs lodged in a single police station implicating the army in cases of damage to property or loss of life or misconduct during counter insurgency operations over the two decades might even run into hundreds. These were lodged either to placate the militants or some other vested interests or in some cases by victims to claim compensation for the damage to their property during a legitimate action against the terrorists. Most were not pursued, as the authorities after initial inquiries were aware that they lacked substance and in almost all cases compensation, where due, was paid in full. Given the high awareness levels and active media that was not very sympathetic towards the army even at the peak of counter-insurgency operations, it is highly unlikely that even a single genuine case was left un-investigated either by the police or the army itself. Even if a percentage of those that are still pending are followed up at much later date, these would involve a large number of serving and retired soldiers answering questions about events, that either never took place- or if they did take place, the entire sequence of events and the facts were other than those recorded. In some cases, 'public relation ambushes' were deliberately designed to trap the security forces into a situation where the firing caused collateral

damage and inconvenienced the people. The subsequent effects were exaggerated and exploited to by terrorists or their front organisations to characterise the security forces as violators of human rights.

It has also been a pattern that most 'Human Right Groups' or the section of the media that investigated allegations was satisfied with only one side of the story told by the people who were available to them at that point in time. The stories themselves in the first place might have been motivated to gain an advantage; or planted or told under duress to promote the beliefs and motives of a terrorist group or a front organisation. It has been very rarely that security forces' version of the story was even sought or presented and given credence or taken cognizance of in the final report. Therefore immunity against investigation and prosecution is a necessity to ensure effectiveness of security forces, while operating amongst people who were under pressure and somewhat sympathetic towards the insurgents. There have been cases wherein the army was asked to defend itself against allegations and versions that proclaimed soldiers as offenders, without even being given a chance to even put forth their version of events.

The case of alleged the 'fake encounter' at Pathribal is a case in point. The army has taken a consistent stand over the years that the killings took place during a planned encounter for which information was provided by the SSP of the local police soon after Chittisingh Pura massacre of the Sikhs. Not only, was the killing claimed as their success by the police in the media, but they also got the consequential benefits. As far as the army unit involved in this encounter was concerned, the operation was planned on basis of information provided by the police, conducted jointly with them and they had no idea of the identity of those killed. Subsequently, once it came to light that innocents had been killed, enquiries were ordered. The enquiry ignored the army's contention and surprisingly blamed it for 'cold blooded killings'. In the Supreme Court, the army had to point out inaccuracies even in the investigations carried out by the CBI and plead that its version had been arbitrarily rejected. Though the case was still sub-judice, the media and civil rights groups had painted the army as the villain of the piece, trying to protect the guilty. The facts were quite to the contrary. The army was only trying to protect the innocent. Had the enquiry report been submitted to

the central government, it would have examined the case de-novo taking also into account the facts that have been conveniently ignored to reach a conclusion, which was contested. The purpose of providing for the sanction of the central government is to ensure that an independent and detached authority views the cases without fear or favour and to maintain balance. The decision of the government is always open to judicial review. The Supreme Court has now ruled that if the Army decides to proceed with a case that constitutes a 'Civil Offence' under the Army Act, such as murder or rape etc. no sanction of the Government is required. However, if the civil court wishes to proceed with the case, it has to refer the matter to the Central Government for sanction. Consequent to the ruling the Army had the option to allow civil authorities to proceed and process the case for Government sanction and await its outcome, thus allowing vested interest to blame the Army further. It decided to take over the case and has proceeded legally under the Army Act. It has probably taken the latter option to demonstrate its willingness to subject itself to scrutiny of the law of the land and to assure the nation of its commitment to fair play.

There has been wide spread criticism of AFSPA. It has been termed 'draconian', 'a fraud on people' and even 'extra-constitutional'. There have also been assertions by people in authority to suggest that it can be arbitrarily revoked by the state government who can withdraw the 'Disturbed Area Provision'. Some of the comments are based on impressions and not supported by facts. The AFSPA is a central act and hence cannot be arbitrarily revoked by the state government. The decision would normally be taken jointly by the governments, at the centre and state, after consultations. The AFSPA 1990 (J&K) is actually an improvement on the AFSPA 1958 applicable in the Northeastern states. To mention one significant difference, the Act of 1990 in Section 3, has specified conditions that must be met before an area is declared as 'disturbed' which is not the case in Act of 1958, where, it is left to the judgment of the government.

The Constitutional Bench of Supreme Court of India, has unambiguously ruled that AFSPA cannot be regarded as colourable legislation or a fraud on the Constitution. The apex court considered and opined that the conferring powers vide Section 4 of AFSPA could

not be held arbitrary or in violation of Articles 14, 19 or 21 of the Constitution of India. The Court extended the scope of the powers vested vide Sections 4 & 6 of the Act, so as to include, by implication, the power to interrogate the person arrested.

There is a perception that while acting under AFSPA, the army is the 'perpetrator, the sole judge and the jury' and hence is free to violate human dignity and rights. This is far from the truth. The 'Dos and Don'ts' for conduct of operations have a legal status having been approved by the Supreme Court, thus intentionally violating them would amount to committing a crime. Since there is no provision under the Act to make rules, the army on its own has laid down self-imposed rules and restrictions for conduct of operations, such as: the quantum and quality of weaponry to be employed; rules of engagement; involvement of local police for carrying out joint operations in populated areas, where presence of police can be practically ensured; detain suspects jointly with police and if detained only by the army in some cases, the suspect is to be handed over to the nearest police station within 24 hours; women have to be searched either by the lady police or by ladies of the community—to name a few.

There is a clear distinction between crime and legitimate operations. An analysis of the safeguards envisages protection only for those persons who act in good faith while discharging their official duties. The recent observation by the Supreme Court that "there is no immunity for rape or murder" is actually the practiced philosophy of the army. The case of Major Rehman Hussain is a good example of this. It was alleged that Major Rehman had raped some women and a pre-teen girl in Bader Payeen village in district Handwara on the night of November 6-7, 2004. The army took immediate cognizance and after an inquiry, disciplinary action was initiated. Simultaneously, the J & K police got the alleged victims medically examined and sent their blood samples and vaginal swabs to Central Forensic Laboratory (CFL), Chandigarh for analysis. The results of the tests were presented to the chief judicial magistrate, Handwara on January 18, 2005. After taking over the case, a General Court Martial (GCM) was ordered. The media was given complete access to the proceedings of the Court to give them an insight into the military justice system that is transparent, free from prejudices

and pressures. The DNA tests conducted by the CFL were negative and did not prove rape by the accused. The Court Martial continued and recorded evidence relating to other charges. Though Major Rehman was pronounced 'not guilty' of rape; he was found guilty of other charges including misconduct and the use of criminal force. Based on the findings the Court directed that he be dismissed from service. The same was confirmed and prompt action taken solely on merit and without prejudice.

Another instance that corroborates the Army's professed stand of not shielding the guilty is the on-going case of the 'fake encounter at Machil'. It was a few days after the encounter when it came to light that something was amiss. The army, without pressure from any quarter, ordered a court of enquiry presided over by a brigadier to look into the matter. The enquiry was completed expeditiously and the findings of the court confirmed that the encounter had indeed been stage-managed. Due cognizance of the case was taken and legal proceedings began under the Army Act. In the meanwhile, a local court also commenced hearing of the charges. The army pleaded that it wanted to try the case and had the jurisdiction to proceed under the law. There was a difference of opinion between the civil court and the army. The case was referred to J&K High Court for decision. An impression was created that the army was protecting the guilty. The reality is otherwise. It is a well-known fact that the military justice system is more stringent and expeditious than the criminal justice processes. The case has since been handed over to the Army and legal proceedings have begun.

There is an established methodology to investigate all allegations. Agencies such as the NHRC, the state government, other groups/organisations and individuals who refer cases relating to the alleged violation of human rights or highhandedness directly to the central government or to the army authorities. Each allegation is investigated. The enquiry examines not only the army's account of events but also takes due note of police reports and versions of headmen/respected citizens/ civil authorities. After the findings are accepted by the competent authority, the case is processed with specific recommendations up the chain to ministry of defence (MoD) in the form of a Detailed Investigation Report (DIR). The government examines the case and takes an independent decision to allow

prosecution or deny the same. In a large number of cases the sanction is denied. This is primarily because most allegations fail the legal scrutiny when investigations are undertaken.

A fact that is relatively unknown is that a large number of cases are closed during investigation. According to the available statistics, 72 per cent of the cases have been closed at the behest of the civil administration, police, courts and victims, complainants or their relatives. Of the 28 per cent cases closed by the army, 15.6 per cent were more than 10-12 years old. Their details were either not available or if available, too sketchy. Even police investigations were inconclusive and no headway could be made. The balance 12.5 per cent cases of human rights allegations are those filed by the next of kin (NoK) of army personnel killed in action against terrorists. All such cases are also thoroughly investigated before closure or disbursement of compensation.

An assessment of the time taken to dispose of cases, where cognizance has been taken by the army is indeed revealing. Out of 104 cases for which data is available, in 46 per cent (48 cases) punishment was awarded within three months of the offence being committed; In 20 per cent (20 cases) within six months; In 28 per cent (29 cases) within one year. In a cumulative total of 94 per cent (97 cases) personnel were punished within one year. Only two cases took two years to settle. These 104 personnel included 39 officers, 9 Junior Commissioned Officers (JCOs) and 56 other ranks (ORs). The punishment varied from 14 years rigorous imprisonment to cashiering, dismissal from service and others as prescribed in the law.

The army accepts that it has made mistakes and it has learnt its lessons. There has been a marked decline in allegations—from as many as 1170 between 1990-99, to 226 during the period 2000-04, to 54 during 2005-09. Only 9 allegations were levelled in 2009, 6 in 2010 and 4 in 2011. The cases also included those filed by NoK of soldiers. However, the army works on the premise that one case is one too many and cannot be left un-investigated.

Hence to say that AFSPA gives the security forces the licence to kill, rape, torture and humiliate is far from true. The spirit of the Act and the manner in which the army's operations are conducted bears testimony to the fact that it is not being used as a cover to commit

atrocities. It is another matter that the Act has become much maligned in the national discourse and has been blamed for all the excesses that have been perpetrated by any agency irrespective of whether it enjoys protection under the Act or not. Its continuation has been touted as the main reason for alienation of the masses and its removal is being projected as panacea for mitigating all the ills and grievances of the people. Lt General KT Parnaik, GOC-in-C Northern Command remarked in an interview that appeared on web site Rediff.com on March 22, 2012: Unfortunately, AFSPA has become a public debate. We look at it as an enabling Act, which enables the armed forces in certain areas to carry out the responsibilities mandated to the Army by Parliament and the Government. Over the years it has enabled us to control infiltration, to target terrorists and it is for everybody to see that the levels of violence have decreased that had peaked in 2000-02. This Act has enabled us to control the situation, in a year when the peace dividend is seemingly appearing on the horizon you don't want to disempower the army.⁶

Analysis of the Options

A number of options have been suggested as alternatives to AFSPA in its present form. They range from the complete revocation of the Act to its partial revocation in some areas; to amending the Act in some manner to make the security forces operate under the Ranbir Act of the state; to replacing the Act by the Unlawful Activities Act of 2008. There are two common threads that run through the thought process behind the suggested alternatives. Acknowledgement of the need to provide safeguards to the armed forces to effectively operate under special circumstances, without fear of retribution for legitimate actions and to prevent misuse of powers. Both are subtle and if analysed carefully, pose a dilemma. Dilution or partial revocation require a deep understanding of the dynamics and have attendant implications. It is essentially a matter for experts who have clear understanding of ground realities. A few issues that need to be considered are discussed in succeeding paragraphs.

6. K T Parnaik in an interview with *rediff.com*, 23 March 2012, <http://www.rediff.com/news/slide-show/slide-show-1-the-general-who-protects-indias-most-critical-border/20120322.htm>, accessed on 20 June 2012.

Reduced violence and declining infiltration must be attributed to pro-active operations by the army in coordination with the police and CAPFs and also due to the changing internal situation in Pakistan. Some view the relative peace in J&K as part of a design to project normalcy and generate support for the revocation of AFSPA before calibrating violence to higher levels. The counter terrorist operations start from the Line of Control (LC), pass through intermediate areas and stretch well into hinterland where terrorists are instructed to operate. Designating areas as being under AFSPA and non AFSPA may well prove to be counterproductive and diminish the ability of security forces to undertake seamless operations. The Manipur experience has shown that the revocation of the Act in some areas could lead to non-AFSPA areas becoming safe havens. The suggestion to lift AFSPA from large towns could also result in terrorists seeking shelter to re-build bases. Any subsequent operation to reclaim the space conceded to the terrorists will be at huge human, material and political cost.

Military installations and lines of communications are spread across the state and close to the population centres. To avoid army assets becoming vulnerable, provisions of AFSPA will have to be invoked in these areas. This would mean having pockets in areas where the Act is not applicable which will further compound problems of jurisdiction and conduct of operations. The intelligence base created through an excruciating slow process over the years will be diluted in areas where the Act is de-notified. It will not be in the larger national interest, as violence elsewhere in the country would then be orchestrated from these areas without intelligence agencies having the ability to provide early warning.

Should a need be felt to re-impose the Act, it will be at grave political cost and may far outweigh the option of not revoking it in the first place. The chief minister of J & K had suggested that instead of AFSPA the security forces should operate under the State Ranbir Penal Code (RPC). When it was pointed out that Section 45 of the CrPC (section disallows arrest of public servants for legitimate acts in discharge of their official duties without sanction of the central government) and Section 197 (provides impunity against prosecution) is not part of the Ranbir Act and laws of the state and hence would not be acceptable. He hinted at suitable amendments

being made to the RPC. The opposition and emotional response it evoked including allegations of 'final surrender' of autonomy, made the option politically challenging and hence impractical.

The option of armed forces operating under Unlawful Activities Prevention Act 2008, as an alternative to AFSPA, an option recommended by Justice Jeevan Reddy Commission is under discussion in some quarters. The Act caters for the twin needs of 'protection' and 'freedom of action'. The Act is comprehensive and has been amended to cover even radiation related terror acts also. There are varying opinions among legal luminaries on its applicability to the army in its present form. There is a need to put some other points that are relevant in perspective. The Act has all an India jurisdiction and it is obvious that the army cannot be allowed to operate unrestricted throughout the land. To that extent a geographical area will have to be defined which is what Section 3 of AFSPA does by declaring the geographical limits of the area where the Act is applicable as 'disturbed'. Article 45(2) of the CrPC reads:

Sanction for prosecution under sub-section (1) shall be given only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government which shall make an independent review of the evidence gathered in the course of investigation and make a recommendation to the Central Government or, as the case may be, the State Government.

The issues of seizures etc. do not materially differ from AFSPA. Prima facie it appears that it would amount to doing the same thing under the garb of another Act. Some constitutional experts strongly believe that the Act in its present form cannot be made applicable to the armed forces and replace AFSPA.

The CRPF which is the next major force in J & K after army, has stated that since nearly 86 per cent of its force is deployed on static duties it would not be difficult for it to operate under the provisions of CrPC in J & K when AFSPA is revoked. While it may be possible to control the situation in towns through CrPC under the directions of a magistrate, it is unlikely that successful counter terrorist operations can be carried out in remote and rugged terrain under the provision of the same Act. The CI operations essentially involve small teams and are pro-active and swift. Information has to be acted

upon and invariably there is little time to await clearances and for magistrates to fetch up before anti-terrorist operations are launched. The CRPF also provides Road Opening Parties (ROPs) to cover the national highway and some other roads. These parties split up in small teams to accomplish their task. In case a particular team is required to take offensive action to ward off any threat to the road or the convoys, they will require a magistrates' requisition to act in that situation. It will never be practical or cost effective to have magistrates exclusively dedicated for ROP tasks that are carried out through daylight hours, 365 days in a year. The groups operating in such circumstances require the protection and freedom of action provided by the AFSPA.

The Way Forward

The army in J & K or the Northeast is not running amok and violating human rights and this is acknowledged by all sections of the population irrespective of their beliefs and political leanings. Hence, the issue of 'high handedness, insensitive and care a damn attitude' towards the people of state and the local government does not stand scrutiny.

There has also been debate on the MoD and army's views regarding the revocation or dilution of AFSPA. The MoD and the army view J&K, as a waning insurgency situation that is intertwined with matters of national security. The army has made its views clear to all concerned, based on its professional assessment. Its views are at best recommendatory and while stating its case, it did not have any confrontation with the state. The ultimate decision will be taken by the political leadership and therefore, putting the onus of delay or obstruction on the army is unfair. The Indian army has always followed the directions of the political authority. In case AFSPA is revoked, it will not be possible for it to operate in the specified areas and the state authorities will have to manage the situation with the resources at their command.

There is a view that AFSPA has become politically unacceptable and will have to be replaced by another Act that provides the security forces with the 'operational freedom' and 'protection' while addressing the concerns of the civil society. The Unlawful Activities (Prevention) Act, 1967 (UAPA) is being suggested as an alternative.

As mentioned earlier, the Act will require major amendments and judicial scrutiny before it can replace AFSPA.

Before making a few recommendations on the way forward, it will be useful to examine the events in 2010 in J&K. Initially except for a few months in 1990, the army has not operated within Srinagar city in any major way. The BSF and later the CRPF with support of the local police had undertaken this task. The AFSPA has been in vogue all these years. During the summer of 2010, agitation dynamics threatened to spiral out of control despite massive reinforcements of the CAPFs. The state government called in the army to initially undertake a flag march and subsequently if required, to control the situation. The army's flag march had a salutary effect on the agitators, reinforced confidence of CAPFs and the situation was salvaged. The army synergised operations with CAPFs and police to control the situation that was fast deteriorating.

This could well be the model for the future. Areas where the AFSPA is to be revoked can be identified and can be converted into police areas where the army does not conduct operations. The intelligence base continues to be nurtured in these areas. Army operations are undertaken only under specific circumstances in conjunction with police that can be specified or when specifically asked for by the state government. Subsequently, as the situation improves externally, as well as internally, an exit strategy could be worked out to ensure a smooth transition. It will lower the visibility of the army, provide space for independent operation by the state police and CAPFs, while the state can ask the army to quickly step in, should the situation so require. Simultaneously, capacity building of the police and the CAPFs could be continued with active help from the army to take up additional responsibilities from the army, in the not too distant a future.

The army on its part has already relocated a number of bases away from population centres. The numbers of vehicles on the national highway have been reduced by greater use of chartered flights at a great cost to the exchequer. In deference to the observation made by the chief minister of J&K and to ease the congestion during peak hours, timings of army convoys have also been adjusted. Such mutual accommodation and respect for maintaining human dignity

is the way forward. There is a need to look at the situation pragmatically and not merely score points. It is sometimes intriguing as to why an army that “keeps nation first always and every time’ is not considered as an ally by all human rights groups and the civil society? Closer interaction rather than an adversarial approach is the need of the hour. To reinforce the argument it would be appropriate to quote General Parnaik who had commanded a corps in Assam before assuming command of India’s Northern Army in J&K: There are many examples of how AFSPA has continued after lowering of violence levels as in Assam, in spite of it not being revoked. Army has devised methods and has its own checks, balances and methodology of ensuring that more space is created for the paramilitary, police to operate in these areas. But should the situation get out of hand this Act enables it to quickly render assistance.⁷ In time, the stage will come “when the army will not be required in some areas. This is not something that can be theoretically spelt out, but it is a process that has to go through in stages.”⁸

Conclusion

The peace dividend has to be passed on to the people without delay to ensure that they become a part of the process, leading to prosperity and lasting peace. The people of J&K have suffered decades of sponsored violence that was alien to their cultural beliefs. The tangible benefits of peace in terms of lower visibility of troops, freedom from fear and opportunities for growth and prosperity are the immediate deliverables. The governments at the state and centre along with responsible stakeholders should formulate a strategy to get rid of the curse of terrorism and finally end their manipulation by inimical powers. The steps will have to be taken in stages and the time is not far when security forces will not be required to provide a secure internal environment. However, knee jerk reactions may put the clock back. There is a need to exercise prudence and caution and take measured steps without playing for short-term gains.

7. Ibid.

8. Ibid.

TO A HUMANE FACE TO AFSPA

Nilendra Kumar

A major factor preventing the return of normalcy in Kashmir is the opposition to the Armed Forces (Special Powers) Act, 1990 (in short AFSPA).¹ Demands continue to be made for its repeal. There have also been attempts at exploring the options of making the law more humane. The option to lift the law from certain districts of the state, while continuing to operate in the areas still “disturbed”, has also been suggested. The ministry of defence (MoD) has so far seemed unwilling to accept any major changes. The deliberations of the Cabinet Committee on Security and the all-party meeting convened by the government have also failed to yield a consensus.

AFSPA is a legislative tool designed to confer special powers on armed forces personnel deployed in areas declared as disturbed or dangerous by the government. Enacted in its present form in 1958, it was extended to the valley as the Armed Forces (Jammu & Kashmir) Special Powers Act, 1990. The Act confers on an officer, warrant officer, or a non-commissioned officer, or any other person of equivalent rank of the armed forces the power to:

- Fire upon or otherwise force, even to the point of causing death of any person disregarding orders against unlawful assembly.
- Arrest without a warrant.

1. Act No. 21 of 1990. It shall be deemed to have come into force on 5 July, 1990.

- Enter and search any premises.
- Destroy any arms dumps.
- Stop, search and seize any vehicle.

The Act also provides legal immunity to military personnel for their actions. Their prosecution cannot be initiated without the prior permission of the central government.

The validity of AFSPA was challenged before the Supreme Court in the case of the *Naga People's Movement of Human Rights vs. Union of India*.² The five judge bench concluded that the above Act cannot be regarded as a colourable legislation or a fraud on the Constitution and the powers conferred under Sections 4 and 5 of the Act are not arbitrary and unreasonable and therefore not in violation of the provisions of the Constitution.

Critics of the AFSPA allege that it gives military personnel draconian powers; that the Act is a tool in the hands of security forces to perpetrate human rights violations; that the central government has retained the Act for decades without any valid justification; and that all cases against military personnel for grave offences reported by state governments to the MoD, have failed to initiate prosecution. Further, there exists a lack of clarity amongst the general public at large regarding the authority of the state government to revoke AFSPA from the state or a part thereof.

A doubt is also expressed regarding the rationale of retaining Section 6 of AFSPA given the provisions already available under CrPC Sections 45 and 197(2).³ Such an apprehension does not appear

2. AIR 1998 SC 431.

3. Section 45 CrPC.

Protection of members of the Armed Forces from arrest.

- (1) Notwithstanding anything contained in sections 41 to 44 (both inclusive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.

The State Government may, by notification, direct that the provisions of subsection (1) shall apply to Such class or category of the members of the Force charged with the maintenance of' public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section shall apply as if for the expression" Central Government" occurring therein, the expression "State Government" were substituted.

to be valid. A perusal of the text of Section 45 would show that it provides limited protection against arrest, whereas the one under Section 6 of AFSPA is much wider. The enactment under the CrPC Section 197(2) only restricts the taking of cognizance by a court. On the other hand, protection under Section 6 of AFSPA is wider and extends over institution of any prosecution, suit or other legal proceedings. Thus, the criticism appears to be misplaced. Further, if the umbrella of Section 6 was to be withdrawn, adequate protection to the troops called out to bring normalcy in a state witnessing dangerous situation would stand diluted, making them vulnerable to legal and criminal harassment.

In December 2006 Prime Minister Manmohan Singh had given an assurance that changes would be made in the Act to make it more humane. However, the law has not been diluted. The Justice Jeevan Reddy Committee report is also believed to have recommended a review of the Act, but that did not come about. AFSPA has remained on the statute book despite both Congress and non-Congress ministries at the centre over the last three decades. The military establishment appears unwilling to agree to any dilution in the statutory provisions. They argue that the absence of requisite legal powers to the units and formations would make them incapable of operating in disturbed areas.

Any major changes to the Act would involve a politically and legally difficult exercise, if required to be undertaken in a short time. However, a number of steps can be taken to give the Act a humane face. These could be undertaken by way of framing of rules and administrative policy. Such an approach could gradually bring normalcy. To begin with, a probe by a staff court of inquiry should be made mandatory in all cases where employment of troops has led to any civilian death or grievous hurt, or caused damage to personal property. Similarly an inquiry should also be held where allegations of sexual harassment are made. Such investigations must

Section 197(2) CrPC—

No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

commence within 72 hours of the official report of the incident or complaints received.

Such enquiries should be held at places easily accessible to civilians. The venue chosen could be a school, inspection bungalow or an institute etc. The media should be allowed free access unless operationally not desirable. For the sake of transparency and credibility, a civilian officer not below the rank of a deputy collector must be present during all such investigations. Military law provisions do not allow such an officer to be a member of the court of inquiry. Therefore, his role could be that of an attendee. Similarly, in all incidents relating to allegations of sexual harassment, a woman officer should be nominated as a member or nominated to be in attendance. Impartial persons could be engaged as translators and interpreters.

The security forces have at times declined to entertain reports of false encounters or disappearances when lodged by the media or human rights activities. Junior leaders need to be suitably sensitised in this regard. Local NGOs should be permitted to take up complaints of human rights violations with local military commanders. These must be treated and processed in a manner similar to requests made under the Right to Information Act. It should be obligatory for army formations to intimate the outcomes of investigations or final reports to them. Such a policy would greatly help in ensuring greater transparency about fair, speedy and objective inquiries.

Persons detained by security forces while operating in an area where AFSPA stands invoked, should be medically examined immediately after their apprehension.

The arrest/seizure memo prepared by the security forces should also bear signatures/thumb impressions of independent persons.

Filing of an FIR must be made obligatory for the security forces immediately after an operation which has resulted in death/serious injuries amounting to grievous hurt or damage to public/private property.

A grievances committee should be constituted in each district and if feasible at the sub division level. These may include the senior most military and police officers of the area besides

representatives of media, local bar association, and one or more prominent citizens.

Proceeding on the undisputed premise that the civil administration continues to function even when the armed forces are vested with special powers, it is advisable that wherever feasible, a civil magistrate should accompany each military contingent deployed in a situation where it might be called upon to use force. In a number of situations, this may not be operationally feasible. There could also be the risk of security being compromised. However, the military commander must in each and every case record the reasons that preclude the inclusion of a magistrate in the column. Presence of a magistrate would afford an independent justification for the use of force. As far as practicable, all military missions envisaging the use of force should be videotaped. The same would present corroborative evidence about the circumstances of the case.

Often cases forwarded to the central government seeking sanction for the prosecution of military officers for any excesses in the discharge of their duties while operating under AFSPA, have been inordinately delayed. This has created deep misgivings about the transparency and impartiality of the government. Critics point out that in last two decades there has hardly been any occasion when the MoD has allowed the prosecution of soldiers to take place. A way out could be that any request for prosecution must be disposed off within a period of not more than three months from the date of receipt of the complaint by the central government. Further, all complaints of human rights abuses against military personnel and pending with the police must be thoroughly probed and decided in a fixed time frame. Formulation of clear policy guidelines has also been suggested to indicate the basis for according, withholding or denial of sanction for prosecution under Section 6 of AFSPA.

There is an impression that security personnel are often reluctant to capture insurgents which they are bound to do by law and hand them over to the police to be eventually tried by courts of law. Perhaps the underlying reason is the very low rate of conviction. To reduce and discourage the use of lethal force by the security forces, incentives or awards could be instituted for the capture of terrorists or militants. This may bring down the number of casualties. Almost

all these changes can be introduced without having to tinker with the Act.

The existing legal framework does not afford any assertive role to the National Human Rights Commission (NHRC) for investigating complaints against security personnel. Perhaps the NHRC could be given due authority to demand time bound formal probes in matters of human rights violations and, further, to monitor their progress and outcome.⁴

Most statutes confer powers on the government to frame rules that can help make the law operational. Strangely, AFSPA does not contain any such provision and therefore a number of relevant terms and situations remain obscure. For example how is the term 'land forces' as contemplated in Section 2(a) to be defined? Would the naval divers who were employed in a major lake in Kashmir valley a few years ago be come within the definition of armed forces? What is the difference between a 'disturbed' and a 'dangerous' situation as mentioned in Section 3? What is the threshold level at which the law and order situation would be characterised as 'disturbed'? In what language is a warning, as contemplated under Section 4(a) to be issued? What should be the duration and means of giving the warning? These aspects are quite relevant as a warning is obligatory for the troops before resorting to firing that can even cause death?

4. Section 19 of the Protection of Human Rights Act reads as under:

- (1) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of the armed forces, the Commission shall adopt the following procedure, namely:
 - (a) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;
 - (b) after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government.
- (2) The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.
- (3) The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.
- (4) The Commission shall provide a copy of the report published under subsection (3) to the petitioner or his representative.

What would suffice as due warning? Is an officer of the designated rank required to record his opinion in writing so that its justification can be evaluated later? The text of *Dos and Don'ts* issued by the Army Headquarters and accorded legitimacy by the Supreme Court could also be accorded statutory sanction thus minimising the scope for frequent changes. The rules would also reduce the scope for subjective individual perceptions in these matters.

There have been doubts expressed in some quarters regarding the legal competence of a state government to revoke AFSPA from its area. The constitutional and statutory provisions do not place any curbs on the power of the state administration to ask for the revocation of the said Act. The governor (read the state government) is competent to initiate steps to requisition the troops to assist the state machinery to deal with a disturbed or dangerous situation. It is the opinion of the state government with regard to the condition being disturbed or dangerous and the use of the armed forces which is statutorily mandatory under Section 3 of AFSPA. The state apparatus continues to function with the assistance and co-operation of the armed forces. It is for the state government to decide when the armed forces are no longer needed and should be returned to the barracks. A contrary view that the state government is not competent to revoke the AFSPA is foreign to the statutory provisions. It would also run counter to the constitutional mandate.

It is also felt at times, that AFSPA, could be replaced by a new law. However, when the validity of the AFSPA has been upheld by the Supreme Court, it's mere renaming would be like an old wine in a new bottle.

Immediate steps to discuss major changes in the working of AFSPA would be a pragmatic move for resolving a major national concern. Clearly, it is the need of the hour.

RIGHTS-BASED CRITIQUE OF AFSPA

Devyani Srivastava

The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary. The question whether the procedure prescribed by a law which curtails or takes away the personal liberty guaranteed by Article 21 is reasonable or not has to be considered not in the abstract or on hypothetical considerations like the provision for a full-dressed hearing as in a Courtroom trial, but in the context, primarily, of the purpose which the Act is intended to achieve and of urgent situations which those who are charged with the duty of administering the Act may be called upon to deal with. Secondly, even the fullest compliance with the requirements of Article 21 is not the journey's end because, a law which prescribes fair and reasonable procedure for curtailing or taking away the personal liberty guaranteed by Article 21 has still to meet a possible challenge under other provisions of the Constitution like, for example, Articles 14 and 19.

Maneka Gandhi vs. Union of India, Supreme Court, 1978

The Armed Forces Special Powers Act, 1958, (hereafter referred to as AFSPA and/or the Act), is a direct assault on the above mentioned legal interpretation of fundamental rights which constitutes a cardinal principle of Indian jurisprudence. Under the Act, in place currently in the Northeast states and Jammu and Kashmir,¹ powers

1. Enacted first in August 1958 in the Northeast territories of Assam and Manipur, the Act was subsequently extended to each of the seven new states of Northeast (Assam, Manipur, Nagaland, Tripura, Meghalaya, Mizoram and

Contd.

vested with the armed forces are neither fair, nor just and reasonable. Such powers are considered essential in situations where the armed forces are required to be deployed to assist the civil government in ensuring peace and stability. But, instead of facilitating peace wherever applied, the Act has only left behind a trail of bitterness and anger. It has ignited wide scale public protests, been criticised by various representatives of the United Nations and other international human rights organisations, and hailed as a “symbol of oppression, an object of hate, and an instrument of discrimination and highhandedness” by the government-appointed Jeevan Reddy Commission.²

Yet the Act persists till date in its original form. It draws its legitimacy from Article 355 of the Constitution which bestows a duty upon the union to protect every state against external aggression and internal disturbance. Additionally, the Act was granted legitimacy by the Supreme Court in the *Naga People’s Movement for Human Rights vs. Union of India*, 1997, the only case where the constitutional validity of the Act was challenged. Consequently, incidents of violations and excesses committed by the armed forces are viewed as mere aberrations, a matter of mistaken judgment by few errant officers.

This paper argues that the provisions of the Act, not only fail to meet legal standards but are in direct violation of the democratic rights enshrined in our constitution and upheld by the Supreme Court. The Act itself perpetuates violation and impunity, as opposed to the claim that violations are only aberrations. The central premise of this argument rests on the fact that law does not mean an enacted act, or a formal procedure but principles of natural justice instead, as laid down in the *Maneka Gandhi* case. Every law requires to be tested against the entire scheme of fundamental rights enshrined in

Arunachal Pradesh). Similar laws were also applied in the state of Punjab from 1985 to 1994 whereas a version of the Act has been in force in the state of Jammu and Kashmir since 1990.

2. Appointed in wake of the indefinite fast undertaken by Irom Sharmila in demand for repeal of AFSPA and the intense agitation following the death of Manorama Devi on 11 July 2004 while in custody of Assam Rifles, the Commission highlighted the scale of violence facilitated by the Act. The report though is yet to be made public.

the constitution and not just specific rights.³ The paper focuses on four provisions of the Act—use of force, arrest and detention powers, impunity and states of emergency and demonstrates how each of these dilute constitutional safeguards and thereby result in violations. Although AFSPA is problematic on a number of grounds, this paper will focus specifically on how it contravenes fundamental rights, for the sake of brevity. Following from the critique, the paper will conclude that in failing to protect and uphold human rights, the Act reinforces a militarised approach to security which has proved to be not only inefficient but, in fact, counterproductive in tackling security challenges.

AFSPA and Human Rights

The Act empowers the central government and the governor of a state to declare any area within their territory as ‘disturbed’ based on their judgment of “disturbed or dangerous situation” warranting use of armed forces. Upon such a declaration, the armed forces have the power to shoot on sight, even to kill, any person believed to be violating existing laws and order prohibiting assembly of more than five persons (Section 4(a)) after giving “such due warning,” arrest any person without warrant, even on the basis of reasonable suspicion of having committed a cognizable offence (Section 4(c)), use such force as necessary to effect arrest, and enter and search any premise without warrant (Section 4(d)). Worse, these powers are provided without adequate safeguards and complete immunity is given to armed forces for the exercise of the powers (Section 6). Not a single offence is defined in the Act and yet such wide discretion is given to the armed forces in such areas. Each of the above provisions is at odds with democratic rights, as explained below.

3. This is the main criticism against the Supreme Court judgment in the *Naga People’s Movement for Human Rights vs Union of India*, 1997, which upheld the constitutionality of AFSPA against Article 14 without referencing Article 21. This position was also enshrined in *R.C. Cooper v. Union of India* [1973] 3 SCR 530 (which dealt with the relationship between Article 31 and Article 19), and *Shambhu Nath Sarkar v. State of West Bengal and Ors.* MANU/SC/0537/1972 (which looked at the relationship between Article 21 and 22).

Use of Force

The absolute authority vested in the armed forces to shoot on sight based on mere suspicion and for an offence as basic as violating an order is a brazen assault on the fundamental right to life. Both domestic and international law have established supremacy of the right to life from which no derogation is permitted even in times of public emergency which threatens the life of a nation.⁴ Terming the deprivation of life by state authorities as a matter of utmost gravity, international law has interpreted this right to include *not just measures to prevent and punish deprivation of life by criminal acts, but to prevent arbitrary killings by the security forces*.⁵ In other words, the “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures. The Supreme Court has interpreted the ‘right to life’ to include the right to live with human dignity whereas the term liberty, as used in the provision, as something more than mere freedom from physical restraint or the bounds of a prison.⁶ The power to shoot on sight violates the sanctity of the right to life, making the soldier on ground the judge of value of different lives and people the mere subjects of an officer’s discretion.

International law lays down a comprehensive framework that requires that lethal force be justified by self defence and governed by principles of proportionality, necessity and last resort.⁷ It imposes a positive duty on governments to prohibit by law all extra-legal, arbitrary and summary executions and ensure that any such executions are recognised as criminal offences punishable by

4. Article 4, International Covenant on Civil and Political Rights, 1966.

5. United Nations, Human Rights Council, General Comment No. 06: The Right to Life (Article 6), 30 April 1982, ICCPR, available at <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/84ab9690ccd81fc7c12563ed0046fae3?Opendocument>.

6. Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295; Sunil Bhatra v. Delhi Administration, AIR 1978 SC 1675.

7. These include the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990; UN Code of Conduct for Law Enforcement Officials, 1979; and Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, 1989.

appropriate penalties.⁸ But under the Act, the powers of the armed forces are highly disproportionate to the offence: that of contravention of any law or order prohibiting the assembly of five persons or the carrying of weapons—or of things—capable of being used as weapons. Such a challenge and defiance of orders does not necessarily invoke the self-defence clause (for which the other party has to be in a position to inflict harm) nor do they require use of force to deal with, leaving too much to the discretion of the individual officer.

Justice also requires that every accused be given all the protections of due process of law. Fair, just and reasonable procedure has been interpreted to include the right to speedy trial.⁹ This right encompasses all stages of trial: investigation, enquiry, trial, appeal, revision and retrial. Killing on the basis of suspicion deprives the victims (who are mere suspects) of all the protections of due process and leads to direct subversion of rule of law. These principles require that governments exercise strict control, including putting in place a clear chain of command for all officials responsible for apprehension, arrest, detention, custody and imprisonment; as well as those officials authorised by law to use force and firearms. As in the case of the right of self defence accorded to civilians, the onus of proof lies with the person operating under this clause. But the protection provided to armed forces against prosecution under Section 7 renders this impossible and thereby directly violates the protection of the right to life.

Powers of arrest and detention

In order to protect and uphold the fundamental right to liberty, extensive safeguards have been placed on the power to arrest, both in international and domestic law. Article 22 of the Indian Constitution lays down several safeguards on preventive and punitive detention including, right to be informed of the grounds of

8. Ralph Crawshaw and Leif Holmstrom, *Essential Cases on Human Rights for the Police*, The Netherlands, 2006, p 40.

9. This was first recognized in the *Hussainara Khatoun & Othrs. vs. Home Secretary, State of Bihar*, AIR 1979 SC 1360 case and subsequently upheld in various cases.

arrest; right to consult; and to be defended by a lawyer of choice; the right to be produced before a magistrate within 24 hours; and freedom from detention beyond the said period except by order of the magistrate. In keeping with constitutional guarantees, CrPC 1973 lays down several checks and balances in order to reduce scope for arbitrary arrests and detention by the state, including the mandatory medical examination of the arrested person (Section 54)¹⁰ and a magisterial inquiry of every case of death in police custody (Section 176). Additional guidelines were further laid down in 1996 by the Supreme Court in the *DK Basu* case,¹¹ in order to address the rampant arbitrary arrests and detention.

Under international law, arbitrariness has been defined as not just being against the law, but interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.¹² Such an interpretation has also been upheld by the Indian Supreme Court, according to which “the existence of the power to arrest is one thing...the justification for the exercise of it is quite another...”¹³ Even in cases of preventive detention, the established legal norm remains the same. According to the Human Rights Committee, if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. “It must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given, and court control of the detention must be available, as well as compensation in the case of a breach.”¹⁴

10. As per Criminal Procedure Code (Amendment) Act, 2009.

11. The judgment laid down 11 guidelines to be followed during time of arrest including preparation of arrest memo by the police officer carrying out arrest, wearing of clear identification mark by the arresting officer, preparation of an Inspection memo including details of major and minor injuries, and information of arrest to be communicated to the police control room required to be established in each district and state. *DK Basu vs. State of West Bengal*, Supreme Court, 1996.

12. United Nations, Human Rights Council, General Comment No 8, Right to Liberty and Security of Persons (Article 9), ICCPR, 30 June 1982, available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument).

13. *Joginder Kumar v. State of UP* AIR 1994 SC 1349.

14. United Nations, General Comment No. 8.

None of these procedural safeguards are provided to the arrestee under AFSPA. Section 4 (c) of AFSPA allows the army to “use such force as may be necessary to effect the arrest” without laying down any restriction on force that can be used in order to prevent causing death of a person whereas under the CrPC, the police are prohibited from causing death of a person not accused of an offence punishable by death or life imprisonment.¹⁵ Then, Section 5 of the Act does not specify a time period within which an arrested person should be handed over to the police station but only requires them to do it with “the least possible delay.” The main purpose of specifying 24 hours for production before magistrate, as mandated under the Constitution and the CrPC, was to avoid scope for torture in police custody and bring the police power of arrest under judicial scrutiny at the earliest. In practice, therefore the AFSPA is in violation of the right to be free from torture, and cruel and degrading treatment.

Although subsequently, the courts have interpreted least possible delay to mean within 24 hours,¹⁶ this is hardly followed. The term least possible delay has been used to detain people for several days, months—even years. In a number of habeas corpus petitions—recognised as the undeniable right of all individuals and one of the most effective remedies against challenging arbitrary detention¹⁷—these excessive delays have been recorded.¹⁸ In Jammu and Kashmir, patterns and factors for delay range from: blatant denial of arrest, claim that the arrested person has either been subsequently release or has escaped from custody, refusal by the armed forces to produce records and documents regarding arrests and detention.

The situation is arguably worse in the Northeast where till recently, only the Guwahati High Court was allowed to hear habeas

15. Section 46(3), Code of Criminal Procedure, 1973.

16. People’s Union for Human Rights vs. Union of India and Others, AIR 1992, Gauhati High Court 23, Judgment on 20 March 1991.

17. Article 9(4), ICCPR; Article 32, Constitution of India.

18. Ashok Agrwaal in *Search of Vanished Blood: The Writ of Habeas Corpus in Jammu and Kashmir: 1990-2004*, South Asia Forum for Human Rights, Kathmandu, Nepal, 2008.

corpus petitions from all seven states. The extent of delays and abuses across other states can only be imagined.¹⁹ In several cases, the court found excessive delay even under Section 5 of the Act. To cite just one example, in the *Nungshitombi Devi v. Rishang Keishang, CM Manipur*, (1982), case the petitioner's husband was arrested by the CRPF on January 10, 1981, and was still missing on February 22, 1981. He had been arrested under AFSPA Section 4(c). The court found this delay to have been too long and unjustified.

Despite this, both the Supreme Court, while listing the Dos and Don'ts in the *Naga People's* judgment and the Justice Reddy Commission, in its proposed draft legislation to be inserted in the UAPA, following repeal of AFSPA, chose to provide these safeguards in a selective manner. For instance, while providing for the preparation of an arrest memo, the draft legislation does not require the memo to be countersigned by the arrested person and attested by one witness; it does not mandate the medical examination of the detainee and preparation of an inspection memo recording marks of injury, as mandated in the *DK Basu* case.

Impunity

Arguably the greatest outrage against the AFSPA stems from the blanket immunity given to the armed forces. No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the central government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

The basic premise of such blanket immunity is to protect the armed forces from frivolous charges, as held in the *Indrajit Barua versus State of Assam* case. It has also been defended on the grounds that the armed forces have high standards of service, that adequate safeguards exist to prevent misuse, and that the army's internal investigation proceedings are sufficient to bring the culprit to account.

Nothing can be further from the truth. The law has allowed operational immunity to the extent that the victims appear to have

19. South Asia Human Rights Documentation Centre (1995), "Armed Forces Special Powers Act: A Study in National Security Tyranny," p 8.

no remedy. To begin with, sanction for prosecution is rarely granted. A document procured by Jammu and Kashmir Coalition of Civil Society from the state home ministry (under the Right to Information Act) shows that from 1989 to 2011 sanction to prosecute was sought in just 50 cases. Of these 31 pertained to the MOD and 19 were sent to the home ministry. Sanction for prosecution is awaited in 16 of these cases, and has been declined in 26 cases.²⁰ The home department says it has “recommended” sanction in eight cases. But so far not a single case of sanction for prosecution has been granted. Then, in many instances, the police have blatantly refused to register FIRs against armed forces, claiming to be acting under directives from higher authorities.

Even if a case does get registered, the armed forces have used the immunity clause to refuse to cooperate with the investigations. In the *Abdul Rauf Shah* case, the Court was asked to appreciate that under the AFSPA the army enjoyed the power of pre-emptive arrest. Invoking Section 7 of the J&K AFSPA, the army claimed that the High Court did not have any power or jurisdiction to entertain even a habeas corpus petition against it, without ascertaining whether Rauf’s family had obtained government permission to institute it.²¹ In the case of the disappearance and murder of Jalil Andrabi, the human rights lawyer and activist, the Indian government granted sanction for prosecution but the army officer responsible, Major Avtar Singh, was allowed to leave the country before sanction was granted, rendering the remedy ineffective.²²

Another glaring instance of this was when the Supreme Court recently pulled up the army for stalling prosecution in the 2000 Pathribal encounter case in Jammu and Kashmir. The Court accused the army of not taking action under the Army Act while at the same time refusing to allow the courts to proceed with prosecution.²³

20. “Shroud of Impunity,” *India Together*, 10 December 2011, available at <http://www.indiatogether.org/2011/dec/hrt-afspa.htm>

21. Ashok Agrwaal in *Search of Vanished Blood: The Writ of Habeas Corpus in Jammu and Kashmir: 1990-2004*, South Asia Forum for Human Rights, Kathmandu, Nepal, 2008, p 65.

22. Fact Finding team to Kashmir (2011), *Report: Four months the Kashmir valley will never forget: An Inquiry into the mass uprising of 2010*, New Delhi.

23. “Supreme Court pulls up army in the Pathribal encounter case,” *The Hindu*, 25 January 2011.

International law is absolutely clear in its rejection of such an immunity clause. In its concluding report on India, the UN Human Rights Council stated that the immunity clause “contributes to a climate of impunity and deprives people of remedies to which they may be entitled in accordance with Article 2, Paragraph 3, of the Covenant. It went on to recommend that the requirement of governmental sanction for civil proceedings be abolished and that it be left to the courts to decide whether proceedings are vexatious or abusive.²⁴ In fact, with the adoption of the International Convention for the Protection of all Persons from Enforced Disappearances, 2006, the right of a detainee to challenge the legality of a detention and receive family visits and legal assistance has become a non-derogable right.

Upholding the independence of judiciary even in times of emergency, when certain rights stand suspended, assumes critical significance.²⁵ The AFSPA requirement of mandating executive sanction for prosecution severely limits the role of judiciary and compromises access to justice. In particular, it affects the realisation of the writ of habeas corpus, one of the most effective remedies against arbitrary detention. In response to the argument that the executive branch has jurisdiction to consider habeas corpus applications, the Special Rapporteur on the Independence of Judges and Lawyers emphasises that applications made to a government never meet all of the conditions required by law to challenge detention before a judge.

While it is necessary to protect public servants from frivolous claims, such an immunity clause, however, only takes into account the interest of armed forces, but does not consider it necessary to provide justice to the victim. In a democratic country committed to rule of law, there can be no place for such immunity. But if such protection for the executive is still considered necessary, clearer rules need to be laid down for the process of securing sanction. For instance, the Rajya Sabha Select Committee on the Prevention of

24. United Nations (1997), Human Rights Council, Concluding observations CCPR/C/79/Add.81 4 August.

25. United Nations (2008), Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/63/271

Torture Bill 2010 recommends that if executive sanction is not given within a period of three months from the date of application, it would be deemed to have been granted.²⁶ It also recommends that every time sanction to prosecution is declined, the said decision should be supported by reasons and should also be appealable. Together, these two provisions will help reduce the procedural delays and facilitate speedy justice for the aggrieved. This issue was also addressed by the National Police Commission which recommended that the need for government sanction be done away with—but instead called upon the government to defend the police officer at its cost.²⁷ This principle not only protects the rights of victims but also serves as a reasonable check against frivolous allegations, thereby also protecting the rights of public servants.

States of Emergency

Finally, in order to complete the critique of AFSPA, it is important to consider it as being against the established legal framework governing situations of armed conflict. It was initially held that international human rights laws do not apply to situations of armed conflict, which are specifically governed by IHL, but this distinction no longer holds. It is now widely believed that international human rights law applies equally in situations of armed conflict.²⁸ States though are allowed to derogate from certain fundamental rights during times of emergency, both under international law and

26. Parliament of India, Rajya Sabha, Report of the Select Committee on the Prevention of Torture Bill 2010, p 16.

27. The National Police Commission (NPC) was appointed by the Government of India in 1977 with wide terms of reference covering the police organisation, its role, functions, accountability, relations with the public, political interference in its work, misuse of powers, evaluation of its performance etc. This was the first Commission appointed at the national level after Independence. The Commission produced eight reports between 1979 and 1981, suggesting wide ranging reforms in the existing police set-up. The Eight Report of the National Police Commission recommends that officers of or above the rank of SP should be empowered to order defence of their subordinates, and government orders should be necessary only in cases when a complaint is filed against an officer of the rank of IGP or DGP, or in cases of allegations of rape and murder. Government of India, National Police Commission, Eight Report, p 7.

28. United Nations Human Rights Office of the High Commissioner, International Legal Protection of Human Rights in Armed Conflict, 2011.

domestic law. While Article 4 of the ICCPR allows this under international law, Article 359 provides for suspension of certain rights under the Indian constitution.

A couple of points here are of critical significance. *First*, even during such times, right to life and liberty are considered as being paramount. As per the Constitutional (44th Amendment) Act, 1978, right to life and liberty (Article 21) and certain rights under Article 20 cannot be suspended even in times of emergency.

In order to check against the misuse of the Emergency provisions and to put the right to life and liberty on a secure footing, it would be provided that the power to suspend the right to move the court for the enforcement of a fundamental right cannot be exercised in respect of the fundamental right to life and liberty.²⁹

Under international law, too, states are prohibited from abrogating certain rights including the right to life; prohibition from torture and equality before law. *Second*, derogations too must be subject to safeguards. These include, one, an official proclamation of emergency by the states before derogation in order to maintain principles of legality at a time when they are needed the most; two, justifications submitted by states as to why such measures are needed; and three, measures are limited to the extent strictly required by the exigency of the situation. Together, these safeguards affirm the value of human rights in tackling with even the most severe of security challenges.³⁰

As a signatory to the ICCPR, India is under obligation to comply with its provisions. But India's official stand has been that AFSPA is not an emergency law and that powers granted under the law do not amount to a state of emergency. In its report submitted to the Human Rights Committee, 1997, government stated that since no emergency exists in India, it does not come under the jurisdiction of Article 4 of the ICCPR. AFSPA was defended as an enabling legislation applied in designated areas and which neither confers extraordinary powers nor detracts from the due process of law or

29. Statement of Object and Reasons, Constitution (44th Amendment) Act, 1978.

30. United Nations (2001), Human Rights Committee General Comment No 29 on States of Emergency (Article 4, ICCPR), CCPR/C/21/Rev.1/Add.11, 24 July, Geneva.

suspend any rights or their enforceability.³¹ Instead of explaining how the challenges in the Northeast and Jammu and Kashmir meet the test of “public emergency which threatens the life of the nation” India’s defends the AFSPA is on the grounds that immunity for security forces is needed so long as there are situations that, in the government’s view, require intervention of the armed forces.³²

But, despite these claims, the fact that India through the Act does in effect use emergency powers in areas designated as disturbed without resorting to Article 4 of the ICCPR was upheld way back in 1997 itself by the UN.³³ The Human Rights Committee expressed concerns over several powers bestowed under the Act including immunity to security forces, preventive detention powers and the power to shoot to kill. Several UN officials have subsequently recommended the repeal of AFSPA including the UN High Commissioner for Human Rights, Navanethem Pillay, UN Special Rapporteur on Human Rights Defenders, Margaret Sekaggya,³⁴ and most recently the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns.³⁵

A glance at the empirical data³⁶ on patterns of abuse and torture committed under the Act both in J&K and in the Northeast will confirm the blatant violation of the right to life and liberty. In many

31. United Nations (1997), Human Rights Committee, Summary Record of the 1603rd Meeting, CCPR/C/SR.1603, 24 July, Geneva.

32. Sanjib Baruah, “AFSPA: Legacy of Colonial Constitutionalism,” *Seminar Magazine*, No 615, November 2010 available at paper http://www.india-seminar.com/2010/615/615_sanjib_baruah.htm

33. United Nations (1997), Human Rights Council, Concluding observations CCPR/C/79/Add.81, 4 August, p 5.

34. See United Nations (2012), Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya—Addendum—Mission to India (10–21 January 2011), A/HRC/19/55/Add.1, 6 February.

35. Press Statement, Country Mission to India, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christ of Heyns, 19-30 March 2012.

36. In addition to the fact finding reports mentioned above, see Human Rights Watch (2006), “Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir;” (2008), “These Fellows Must be Eliminated: Relentless Violence and Impunity in Manipur;” Amnesty International (2005), “Briefing on The Armed Forces (Special Powers) Act, 1958,” 8 May, ASA 20/025/2005.

ways, AFSPA is even worse than an emergency law that at least protects right to life, can be declared for a short period of time, and the President's emergency order has to be reviewed by the parliament. AFSPA can be in place indefinitely and requires no legislative approval.

Conclusion

By way of summing up, it is clear that the provisions of AFSPA, both individually and in totality, do not meet requirements of domestic and international law. The Act facilitates human rights violation and spawns a culture of impunity. To consider such powers and immunity as necessary to combat security challenges is a reflection of the continuance of the colonial mindset of subjugating the local population. The suggestion that human rights violations are permissible in certain circumstances is wrong.³⁷ The essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by state or non-state actors, are never justified no matter what the ends.

Research elsewhere has established the negative impact of such special security legislations on both, the rule of law and the peace process.³⁸ Two lessons that support the arguments of this paper are of particular significance. First, that once civil liberties are eroded by statute, it is almost impossible to reinstate them leading in turn to normalisation of emergency legislations; second, that such legislations shatter the faith of people in the criminal justice system, making it difficult to regain trust. Both of these apply in the case of AFSPA. The fact that the Act is in place in the Northeast states since 1958, and that while reviewing the Act, both the Supreme Court (in upholding the law) and the Reddy Commission (in not ensuring adequate safeguards) do not match up to the established standards calls into question their impact on rule of law. It is important to note

37. Legal Commentary to the ICJ Berlin Declaration Counter Terrorism, Human Rights and Rule of Law, Human Rights and Rule of Law Series No. 1, International Commission of Jurists, 2008.

38. Committee on the Administration of Justice (2008), *War on Terror: Lessons from Northern Ireland*, Northern Ireland, United Kingdom, available at <http://www.caj.org.uk/contents/479>

here that these standards have evolved precisely to respond to security challenges and not just for peace times.

Ultimately, the continued use of AFSPA reflects the predominance of a security mindset within the government of India. To put an end to the culture of violence, alienation and injustice, it is important not only to repeal AFSPA but also reduce the civil powers accorded to the army to ensure that it in fact only assists and not supplants the civil administration. It is now universally accepted that the most effective strategy for counterinsurgency and counterterrorism is to strengthen the local police and civil administration. Alongside withdrawal of the armed forces from town and cities, the police must be trained in accordance with international standards and eventually become the frontline force in the state.

But if force is to remain an ingredient of Indian government's response, it must amend AFSPA in conformity with domestic and international standards. This includes revocation of the power to shoot on sight, adhering to guidelines on arrest as laid down in the CrPC and *DK Basu* judgment, prohibition of use of force while effecting arrest, production of each arrestee within 24 hours before the court, and removal of the immunity clause so people have access to remedies in case of violation. Finally, protection of human rights and the criminal justice system must be developed as the bedrock of any security strategy. Only then will conditions for peace and conflict resolution be created.

AFSPA IN LIGHT OF HUMANITARIAN LAW

Ali Ahmed

Introduction

A study of the Armed Forces Special Powers Act (AFSPA)¹ can be undertaken in light of its consonance or divergence with International Human Rights Law (IHRL), International Humanitarian Law (IHL) and with domestic law. AFSPA has been examined extensively through the prism of human rights and in light of constitutional provisions. While the human rights perspective has been taken by the BP Jeevan Reddy committee,² the Supreme Court has pronounced on its constitutional validity in its 1998 judgment on the Nagaland case.³ This paper restricts itself to undertaking a look at AFSPA from the IHL perspective. The paper first seeks to define IHL and then examines the scope for the applicability of IHL

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1. For text of the Act in respect of the North East, see http://www.mha.nic.in/pdfs/armed_forces_special_powers_act1958.pdf.
 2. The Jeevan Reddy committee was set up to review the AFSPA pursuant to the agitations in Manipur over the alleged rape and killing of Th. Manorama Devi by the Assam Rifles in 2004-05. Text available at <http://www.hindu.com/nic/afa/>
 3. The Supreme Court bench comprising Chief Justice, M.M. Punchhi and Justices, S.C. Agarwal, A.S. Anand and S.P. Bharucha passed their judgment on the Naga People's Movement of Human Rights Vs. Union of India case on November 27, 1997.

after which the situation obtaining in areas declared as 'disturbed' under the AFSPA is assessed to ascertain applicability of IHL.

In Theory

An ICRC opinion paper (2008) defines international armed conflicts (IAC) as existing whenever there is armed conflict between two or more states. On the other hand, non-international armed conflicts (NIAC) are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising in the territory of a state. The definition goes on to say that: 'The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.'⁴

There are two treaty sources for NIAC. The first is Common Article 3 of the Geneva Convention and the second is the Additional Protocol II.⁵ The latter is not relevant to India since India is not a signatory and as the provisions of the protocol are not part of customary international law, the protocol does not have significance for India. Additionally, in AP II the threshold for application of NIAC is pitched considerably high as those:

... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.⁶

AP II being ruled out, Common Article 3 therefore assumes significance.⁷ India is a signatory to the Geneva Conventions and these have been incorporated into domestic law by the Act of 1960.⁸

4. How is the Term "Armed Conflict" Defined in International Humanitarian Law? International Committee of the Red Cross (ICRC) Opinion Paper, March 2008, <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>

5. Ibid.

6. For text of AP II, see <http://www.icrc.org/ihl.nsf/full/475?opendocument>

7. Jelena Pejic, "The protective scope of Common Article 3: more than meets the eye," *International Review of the Red Cross*, Vol 93, No 881, March 2011.

8. For text of the Act, see <http://vlex.in/vid/the-geneva-conventions-act-29630877>

Common Article 3 does not specify a threshold since it includes only the 'minimum provisions' envisaged in 'the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.'⁹ While it excludes internal disturbances and tensions, the threshold is generally equivalent to that given in Article 1(2) of APII.

Internal disturbances, in contrast to armed conflicts, are marked by the serious disruption of domestic order through acts of violence.¹⁰ There are two criteria for the levels of violence that have to be reached for a situation to go beyond internal disturbance to qualify as an armed conflict for Common Article 3 applicability.¹¹ First is, that it must necessitate the employment of armed forces. The situation must be problematic enough to require the employment of the higher order of force available with the armed forces. This implies that the 'intensity criteria' must be sufficiently high. The indicators are the: number, duration and intensity of military engagements, the type of weapons and equipment used, numbers of persons and types of forces involved in the fighting, the number of casualties, the extent of destruction, and the number of civilians fleeing etc.¹²

The second condition is that the non-governmental groups involved must possess organised armed forces. The 'organisation' criterion includes the existence of a command structure and disciplinary rules and mechanisms within the armed group; the ability to procure, transport and distribute arms; the group's ability to plan, coordinate and carry out military operations—including troop movements and logistics; its ability to negotiate and conclude agreements such as cease-fire or peace accords etc.¹³

9. For text of Common Article 3, see <http://www.icrc.org/ihl.nsf/WebART/375-590006>

10. For a definition, see "ICRC action in connection with internal disturbances," *International Review of the Red Cross*, May-June 1993, No 294, <http://www.icrc.org/eng/resources/documents/misc/57jmj9.htm>

11. Jelena Pejic, "The Protective Scope of Common Article 3," p 191.

12. *Ibid*, p 192.

13. *Ibid*.

Applicability of IHL for 'disturbed areas'

From the above discussion it is evident that states have kept the threshold of for the applicability of IHL so high as to preserve their sovereignty. This has led to exclusion of internal disturbances from the scope of IHL. Such situations can then be tackled by states under domestic law. The security situation as envisaged for application of APII has seldom obtained in India. APII level thresholds can only obtain in case of armed rebellion, for which Emergency provisions of the Constitution (Article 352) would apply.¹⁴

At best the brief takeover of Mizo Hills by the Mizo National Front in 1966 can serve as an example of armed groups having taken territorial control.¹⁵ Currently, while Maoists exercise some territorial control in Naxal affected areas, the parameters of levels of capability and violence are, arguably, not satisfied, since the state has adopted a development first approach as against a security centric one.¹⁶ Therefore, armed forces have not been deployed in central India, where the Central Armed Police Forces have taken charge. This may be a preliminary phase of operations with the state first building capacity, becoming situationally aware and then taking on the Naxals in their forest bastions over time. In that case, there would be higher intensity insurgency and counter-insurgency operations that can lead to the situation being characterised as an armed conflict. It can be expected however that the state may vacate the areas under control of Naxals in the short term, but the protracted operations, of limited intensity, will follow from the horizontal spreading out of the Naxals, displaced from their strongholds. In other words, security situations have a propensity to move from being internal disturbances to armed conflicts and *vice versa*. Consequently, there can be scope for movement in the characterisation of the conflict and the applicability or otherwise of IHL.

14. For text, see <http://indiankanoon.org/doc/1018568/>

15. Ministry of Defence, Annual Report 1966-67, New Delhi: Government of India, 1967, p 21. The report describes the situation as: 'Extremist elements in the Mizo Hills District posed a serious threat to the maintenance of law and order by the civil administration in the beginning of March 1966. Well planned, widespread and coordinated attacks were made by armed gangs on various administrative centers and outposts in the district.'

16. For a media resource on operations in Central India, see <http://articles.timesofindia.indiatimes.com/keyword/operation-green-hunt>

Generally, the lower intensity of violence, even where addressed by armed forces, explains the imposing of AFSPA to address the 'internal disturbance' in 'disturbed areas'. The Supreme Court reflecting on the threshold stated: 'For an area to be declared as 'disturbed area' there had to exist a grave situation of law and order ... that the area was in such a disturbed *or* dangerous condition that the use of armed forces in aid of the civil power was necessary.'¹⁷ Article 355 of the Constitution, that legitimises the Union's deployment of forces under AFSPA, enables such action in support of states as the Union's duty 'to protect every state against ... internal disturbance'.¹⁸ Therefore, the AFSPA threshold is taken as 'internal disturbance', which manifestly does not amount to armed conflict. This places such situations outside the scope of IHL.

However, the AFSPA in respect of the J&K of 1990¹⁹ appears to indicate a higher threshold in its Article 3, specifically, that the disturbed areas have a 'disturbed *and* dangerous condition' that makes:

... the use of armed forces in aid of the civil power (is) necessary to prevent: (a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people...; (b) activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India...

Where territorial sovereignty is threatened and terrorism is endemic, there is a case to regard the situation—in specific phases—as more than an internal disturbance amounting to an armed conflict.

Additionally in J&K, there is the element of the Pakistani proxy war in which military support for the groups operating in J&K, comprises in part of Pakistani nationals. This interference seemingly 'internationalises' the internal conflict, giving it the cadence of the

17. Text of judgment is available at <http://judis.nic.in/supremecourt/helddis.aspx>

18. For text, see <http://indiankanoon.org/doc/490234/>

19. The text of the AFSPA for J&K is not identical to that of the AFSPA relevant for the North East. For text, see http://www.mha.nic.in/pdfs/Armed%20forces%20_J&K_%20Spl.%20powers%20act,%201990.pdf

non-official category of—‘internationalised non-international armed conflict’ (INIAC).²⁰ However, even this term is not applicable since INIAC involves state actor interference in an NIAC, and not that of proxy non-state actors. For interference by a state actor, its role in the intervention through non-state actors must amount to being in ‘overall control’ going beyond financing and equipping, to planning and supervising military action.²¹ In such a case, IHL for IAC will apply. Such a situation does not obtain in J&K since Pakistan has attempted ‘plausible deniability’ and India, for its part, has not chosen to formally identify Pakistan’s action to be of such an order. India’s preference has been to restrict the depiction of the situation in J&K, as an internal disturbance, even during phases of more pronounced violence as arguably obtaining from 1990-97 and 1998-2003 that warranted it to be characterised as an NIAC.

Nevertheless, from a legal perspective, there have been phases of limited duration, such as at the end of the Kargil War when the situation that included ‘fidayeen’ attacks, can be said to have escalated to higher levels of intensity. But whether that phase can reasonably be described as an internal disturbance is to be considered. This would take it into the armed conflict domain making it an NIAC. The corresponding spike in Pakistani complicity also makes it possible to consider this as an IAC. This observation reinforces the point that a situation can transit from internal disturbance to armed conflict, with the nature of armed conflict being IAC or NIAC depending on levels of external complicity. In so far as the situation on the Line of Control (LC) is concerned, the relevant rules of IHL for IAC are applicable even in the absence of open hostilities.²² This was so prior to the ceasefire of November 2003.

20. ‘Non-official’, because IHL distinguishes two types of armed conflicts, international armed conflicts between states, and non-international armed conflicts, between governmental forces and nongovernmental armed groups, or between such groups only. Legally, no other type of armed conflict exists.

21. According to International Criminal Tribunal for the former Yugoslavia (ICTY), Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, ‘overall control’ is when a state ‘has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group (Para 137).’

22. By definition, ‘an armed conflict exists whenever there is a resort to armed force between States’. IHL becomes applicable in any case of such resort.

The operation of the AFSPA for over half century in the Northeast and for two decades in J&K suggests that the armed groups have the capacity for 'protracted armed confrontations'. The intensity of violence has episodically been at a 'minimum level of intensity' along with a 'minimum of organisation'. This implies that security situations warranting that areas be declared 'disturbed' sometimes temporarily are of levels that can be characterised as NIAC requiring the applicability of IHL under the Common Article 3 threshold. However, military action by the state in response, such as the better known Operation Bluestar in 1984 and the lesser known Operation Sarp Vinash in Surankot in 2003,²³ speedily reduces the level of intensity. This negates the criteria of protraction and intensity at levels necessary to qualify as armed conflict. The situation thus can be better described as 'internal disturbance' than armed conflict. As for the other criterion, of use of armed forces that weighs in favour of a situation being characterized as armed conflict, India is moving away from deploying the military in such situations by enhancing the capability of the central police forces to undertake such operations.

The definition of NIAC not having been attempted in Common Article 3, the threshold of its applicability is pitched high by states. Governments are understandably reluctant because of sovereignty considerations to concede belligerency opportunities for the non-state groups who they accuse of posing an armed challenge to the state.²⁴ This reluctance is despite Common Article 3 stating that its application 'shall not affect the legal status of the Parties to the conflict.'²⁵ Nevertheless, the treaty provisions of non-international armed conflict being somewhat less comprehensive than for IAC, the significance of customary international humanitarian law for NIAC goes up.

Therefore, the provisions of Common Article 3, that is widely

23. Praveen Swami, "Operation Sarp Vinash: The Hype and the Folly", *Frontline*, Vol 20, Issue 13, June 21–July 04, 2003.

24. Roderic Alley, "Internal Conflict and the International Community: Wars without end?", Aldershot: Ashgate Publishing Company, 2004, p 120.

25. Common Article 3 states: 'The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.'

accepted as a mini-Convention, applicable under both treaty and customary law, that then need implementing are:²⁶

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court...

Finally, the Martens Clause of IHL, is embedded in all the four Geneva Conventions thus: 'Obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of the public conscience.'²⁷ This serves as a 'catch all' clause, weighing normatively in favour of humanitarian concerns against military necessity in all circumstances.

As is a given in IHL, these humanitarian protections are to be weighed against military necessity. AFSPA powers to the armed forces under Section 4 reflect military necessity. However, their exercise has to be in 'good faith'.²⁸ Since it is no one's case that the provisions of Common Article 3 can be ignored while countering insurgency and terrorism, if Common Article 3 applies, there is no obvious problem. The state's domestic law obligates respect for the provisions in any case. The advantage that accrues upon acknowledging the applicability of Common Article 3 is that the non-state party is also then duty bound to ensure that its provisions are not violated. In any case, the non-state actors do not get additional legitimacy and can be proceeded against under domestic law. The

26. For full text, see <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e63bb/6fef854a3517b75ac125641e004a9e68>

27. Geneva Conventions I/II/III/IV have the clause embedded in Articles 63/62/142/158 respectively.

28. Part of text of Section 6 or 7 depending on the AFSPA operational in North East or J&K respectively.

other advantage is that legal deterrence against violations by both sides is enhanced with IHL reinforcing domestic law. This will prevent any permissive atmosphere from developing.²⁹

Where IHL is operative, grave breaches of the Geneva Conventions are to be prevented by states. Article 3 of the Act of 1960 making Geneva Conventions domestic law dwells on penalties for grave breaches: 'Where the offence involves the wilful killing of a person protected by any of the Conventions, with death or with imprisonment for life,'³⁰ then Articles 49 and 50 of the Geneva Conventions come into play. Article 50, significantly states:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, ... not justified by military necessity and carried out unlawfully and wantonly.³¹

Grave breaches are now included as war crimes in the Rome Statute of the International Criminal Court. Article 8 has it that 'The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.' Vide para 8 (c) these crimes include 'serious violations' of the Geneva Conventions, namely, '(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment.' This 'does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of

29. Violations can occur in case of degradation in the conflict. For instance in respect of use of torture, Wikileaks reporting a cable from the US Embassy in Delhi, gave out that the cable stated: "ICRC staff made 177 visits to detention centres in Jammu and Kashmir and elsewhere (primarily the north-east) between 2002-04, and met 1,491 detainees—of which 1,296 were private interviews. In 852 cases, detainees reported what ICRC refers to as "IT" (ill-treatment)..." See, "Torture tales: Leak sings India on Kashmir," *Times of India*, 18 December 2010.

30. Refer Note 8.

31. For text of Article 50 of GC I, see <http://www.icrc.org/ihl.nsf/WebART/365-570061>

a similar nature.’ Article 8 describes NIAC as ‘when there is protracted armed conflict between governmental authorities and organised armed groups....’³²

The Rome Statute is not relevant to India since India is not a signatory. Nevertheless, customary IHL is applicable. The normative framework for NIAC is more detailed in customary law. The trend is towards violations of customary IHL having universal jurisdiction. Under customary law, states increasingly have a right to universal jurisdiction in national courts for war crimes, even those committed in NIAC.³³ This would apply equally to the non-state actor indulging in violations through terrorism. An advantage of having IHL cover is that war crimes committed by non-state actors, such as Pakistani groups, can be taken up for prosecution under international criminal law. Domestic law is applicable only to those within the power of the state. Those outside the state, such as master minds manipulating the proxy war from outside, can be prosecuted in case the threshold according Common Article 3 is seen to be, as indeed it does in proxy war. Though states can do without the external factor in internal affairs, allowing for the application of IHL makes strategic sense. Violations lead to an alienation-suppression cycle, which according to counter insurgency literature a state can ill afford. Military effectiveness will not be compromised since military necessity is an acknowledged factor in IHL. This can be determined periodically by India in its six monthly consideration as mandated by the Supreme Court for extension of ‘disturbed’ status for areas under AFSPA.

Conclusion

The IHL applies in areas where AFSPA operates depending on the intensity of violence in areas designated as ‘disturbed’. IHL in the form of Common Article 3 is applicable in ‘disturbed areas’ at levels of insecurity as once obtained in J&K and may obtain elsewhere in future, such as in central India. Provisions of Common Article 3,

32. For text of Rome Statute, see [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf)

33. C. Ryngaert, “Another Afghan Case in the Hague District Court: Universal Jurisdiction over Violations of Common Article 3,” *The Hague Justice Portal*, September 2007, <http://www.haguejusticeportal.net/index.php?id=8213>

incorporated into domestic law in the Geneva Conventions related Act of 1960, need to be implemented in such instances. This will be additional cover against violations by the state and will likewise obligate non-state actors. This will mitigate the plight of the people in areas declared 'disturbed', who are otherwise subject to being buffeted about by the actions of security forces and the outright disregard of non-state actors. India will then be fulfilling its obligations as per Common Article 1 of the Geneva Conventions that reads: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.'

AFSPA: A CASE OF PERCEPTIONS AND THE LOSING BATTLE OF PUBLIC DIPLOMACY

Shruti Pandalai

AFSPA in public perception invokes reactions such as “draconian law”, “human rights violation”, “fake encounters”, images of the aftermath of the “Pathribal massacre in J&K”¹ and the face of “Irom Sharmila” who with her 11 year fast against AFSPA in Manipur has become a symbolic of the anti-AFSPA movement. One cannot also shake off the memory of the Meira Pabi movement in 2004, where 12 Manipuri women stripped in front of the Kangla Fort, the then headquarters of the Assam Rifles, shouting: “Indian army come and rape us all”²—a dramatic protest to draw the attention of India and the world to the alleged abuse of AFSPA in the Northeast. As one recalls these episodes—the emotions that arise are contempt, distrust, helplessness and anger against the security forces. These emotions colour perceptions and with story after story these perceptions become belief systems.

1. A high profile case which led to mass street protests in J&K where 8 officers of the army have been accused of carrying out fake encounters of 5 youths in Pathribal in March 2000. For more see http://articles.economictimes.indiatimes.com/2012-05-04/news/31573073_1_pathribal-cbi-sanction
2. See more in “India’s forgotten fast”, Sudha Ramachandran, *Asia Times Online*, 8 September 2011, accessed on URL: http://www.atimes.com/atimes/South_Asia/MI08Df01.html

“There is a problem of perception with the AFSPA- for where and why it is in place” argued Omar Abdullah, Chief Minister of Jammu and Kashmir, in an interview with Barkha Dutt of NDTV.³ “When are the people going to reap benefits of the often talked about peace dividend? How long are we supposed to wait?”⁴ He was making a case for the partial application of AFSPA on the LoC and border with Pak and in the selected troubled areas, but its revocation from other parts of the state at the height of the AFSPA debate in 2011. A theme that is articulated by many a politician in India and perhaps reflects public sentiment. The statement seems to suggest that peace and normalcy in the valley have been held hostage by the AFSPA, when it is no secret that insurgency in the valley is a result of years of political mis-governance and absence of socio-economic reforms. So here’s a thought: if there were a political guarantee of sustaining peace in the valley, would the armed forces seem so unwilling?

It is ironic then that in a world of instant judgments delivered by media opinion polls, Facebook associations, tweets and re-tweets; when a national English news network asked viewers to poll: ‘Whether the army was needed to govern Jammu & Kashmir?’—79 per cent voted in favour.⁵ While this may be no yardstick to go by; it does suggest that the Indian army is a respected and cherished institution of the country, and people acknowledge and have the faith that when all political solutions fail, it is the last institutional resort for many a complex situation. Yet in the case of the AFSPA debate, the army’s stand has been perceived as uncompromising and ‘repressionist’. The forces seem to give an impression of fighting for the retention of AFSPA rather than merely seeking operational powers and protection and here in lies the problem. For after all,

3. For the complete interview see; “Problem of perception with AFSPA: Omar Abdullah”, interview with Barkha Dutt, *NDTV in Think Fest Goa*, 6 November 2011, video accessed on www.ndtv.com on URL <http://www.ndtv.com/video/player/news/problem-of-perception-with-afspa-omar-abdullah/215418>

4. Ibid.

5. “AFSPA Debate: Is army needed to govern Kashmir”; Opinion poll on “Face the Nation with Sagarika Ghose” on *CNN-IBN* on 15 September 2011; accessed on www.ibnlive.com on URL: <http://ibnlive.in.com/shows/Face+the+Nation/131083.html>

the army is only deployed on orders of the government and can be similarly withdrawn. It's unfortunate that the issue has been politicised to such an extent that perceptions which may not always be factual are increasingly driving reality.

This dichotomy in perception has been brought out beautifully in an article which describes how when an army Jonga passes by in the Rann of Kutch, hoards of children, are seen gleefully jumping, chasing, waving and saluting the soldiers protecting their western borders. However you could expect similar scenes in Jammu, but not in Kashmir and the Northeastern states. The writer says that there: "Young boys and girls take aim with imaginary guns shooting as a convoy passes."⁶ It is a powerful image. It refers to the same army, the same soldiers, yet in situations where they are perceived simultaneously in different parts of the country as heroes and villains.

If one were to "google" "AFSPA"; the search engine's first few pages will reveal a slew of articles by human rights groups and media opinion pieces calling for the repeal of the act. You will come across heart wrenching accounts of locals both in Kashmir and the Northeast who have lost their loved ones in encounters and counter-insurgency operations conducted by the armed forces. These stories are of mothers, sons, daughters recounting the years of living in fear and terror under 'emergency laws'. The army's attitude is often criticised as insensitive, and their treatment of civilians as apathetic and high-handed. "It is a question of training. The army is trained to be aggressive, to deal with the enemy, but can you behave the same with civilians?";⁷ says an article quoting an expert on the AFSPA debate.

Senior Kashmiri Journalist Ifthikar Gilani has given instances where civil vehicles are not allowed to overtake army vehicles or civil vehicles being forcibly requisitioned by army personnel for

6. For more see ; "To repeal or amend. What should we do with this Act?", *Avlok Langer, Tehelka*, 1 October 2011, accessed on URL : http://www.tehelka.com/story_main50.asp?filename=Ne011011repeal.asp , also available in print in *Tehelka Magazine*, Vol 8, Issue 39, 1 October 2011.

7. Ibid.

operations. Such reports have tarnished the image of army.⁸ He also cautions that since the local populace does not really understand the difference between army and BSF or any other para military forces, any incident of human right violations is attributed by civilians to the army. Contrary to mass perception, the AFSPA also covers operations of the BSF (Border Security Force) and the CRPF (Central Reserve Police Force) and not just the army. Yet not many of us know that. The onus of combating this misconception lies with the armed forces who must reach out to the local populace and change the perception of the AFSPA being only associated with the olive green.

Shoot to kill, arrest and detention without warrant and protection from persecution—the most controversial provisions of the AFSPA are touted as the “armed forces bullet-proof vest” and “rights without responsibility” in many a prime-time television debate.⁹ These platforms give all sides the opportunity to tell their stories, but some make stronger impressions than the others. For instance in the show “We the People” on NDTV 24x7 Manorama Devi’s brother recounted how his sister was picked up, questioned, allegedly tortured and raped by armed forces on suspicions of abetting insurgency. He asks why for an institution that professes to adhere to the law of the land, did not have women constables present on the occasion. The show also gave voice to mothers of both civilians and army officers who have lost their children in this protracted political war. Many argued that for the crimes of a few, the entire organisation could not be tarnished.

The army’s reply to most accusations of lack of transparency and protectionism is defensive. Most often than not we hear senior retired officers on television and print arguing that, “ the forces are working with one hand tied behind their back” and “forces are deployed not by choice but out of duty” and if AFSPA is repealed

8. See Transcript of interview of Senior Journalist Ifthikar Gilani, speaking at a Seminar on “Perception Management for Indian Army” held by the Centre for Land Warfare Studies (CLAWS) in New Delhi on 21 February 2012, accessed on URL: http://www.claws.in/index.php?action=master&task=1092&u_id=36

9. “We the People” with Barkha Dutt debate on AFSPA on NDTV 24x7, 30 August 2010, accessed on URL: <http://www.youtube.com/watch?v=vZM0i82AvlY>

then “the army must be removed and the police should be dealing with the problem”.¹⁰ These are valid points if seen from the perspective of a force that has waged a protracted political war and won some semblance of hard fought peace in two of India’s potentially most explosive regions. It has stuck to its mandate when politicians have played vote bank politics. The army is concerned that in the absence of clear political will, the political masters will fail to deliver. Yet the army has to accept that if it needs to continue operations in these contested spaces it will have to accept that no institution is infallible, and it can only win this war with the people on its side.

Ajai Shukla writes in the *Business Standard*:

In its opposition to loosening AFSPA, the army has been painted as an unreasoning bully with an aversion to Kashmiris and a pernicious addiction to violence. This is not true. The army has, in fact, offered a persuasive counter-argument in meetings of the Unified Command Headquarters with Omar Abdullah, listening in. But since the military seldom leaks or tweets, its viewpoint remains unreported.¹¹

This perhaps is the biggest part of the problem. In a world, where perception makes or breaks political fortunes we need to hear more from the armed forces. When the army says it has court martialled personnel in 90 per cent of the cases of human rights violations brought to its notice, we need to see and hear more about those indicted. People need to know that those guilty cannot hide behind the garb of olive green. So far the biggest failure for the armed forces has been its inability to prosecute high profile cases in the public domain, with transparency and to be seen to be doing right. While the constant scrutiny may be insufferable and frustrating, but that’s the price a soldier pays for being a national hero. The country sadly, never has such high expectations from politicians or policemen.

10. Based on conversations with senior army officers and defence correspondents who do not wish to be named. However, similar arguments have been made by most panelists defending the stand of the armed forces on television debates as well as in opinion pieces written in the media.

11. “Reassure the Army on AFSPA”; *Ajai Shukla, Business Standard*, 13 December 2011, accessed on URL: <http://ajaiashukla.blogspot.in/2011/12/reassure-army-on-afspa.html>

Amidst the din and posturing on the AFSPA debate, what is overlooked also is some of the good work done by the armed forces. As part of building bridges with the local population the army has been making outreach efforts through 'Operation Sadbhavana' and 'Operation Samaritan' in areas of CT/CI operations. These have been very well received but there is hardly any mention of these in the media. Even YouTube videos of the good work done by the forces have been shown by channels like DD-Kashmir which has very few takers and even lesser hits.¹² This shows that little or no thought has been given to engaging with stakeholders who can help re-invent the armed forces image in the battle against insurgency.

The army is finally coming around to acknowledge this chink in its armour. Top army generals mandated to the task have admitted that:

... to improve the self image of Indian Army there is a need for synergy in perception management. Presently there is no perception management policy at national and armed forces levels. Within the armed forces, there is no synergy between the DPR (Defence Public Relations) and other branches.¹³

There is also a growing realisation that engaging the media can no longer be the last resort. Keeping pace with social media technologies and ensuring that a balanced view appears in international, national and regional media and focus on image building through documentaries, films, TV shows, radio, and print have been suggested as immediate corrective measures by experts.¹⁴

In fact, defence correspondents have underlined that during "CI/CT operations, regional language media should be the first priority for the military. Military should engage with them when it goes to a new area like it does with political leaders, doctors, lawyers,

12. Operation Sadbhavna when searched on youtube has less than 200 hits on videos uplinked, for more see http://www.youtube.com/results?search_query=operation+sadbhavana&sa=X&spell=1&search=Search&oi=spell

13. See Transcript of interview Maj Gen SL Narasimhan, AVSM, VSM, ADG(PI); speaking at a Seminar on "Perception Management for Indian Army" held by the Centre for Land Warfare Studies (CLAWS) in New Delhi on 21 February 2012, accessed on URL: http://www.claws.in/index.php?action=master&task=1092&u_id=36

14. Ibid.

local religious leader etc.”¹⁵ It establishes the first connect to the local population by taking them into confidence; since people are always interested in news which affects their day to day lives. Gestures like an apology rendered by the then GoC 15 Corps Lt Gen Hasnain for unintentional misconduct by army personnel during a recent operation went a long way in assuaging the fears of the locals affected.¹⁶

Despite the promises made by the political class, the repealing of the AFSPA from Kashmir and the Northeast seems highly unlikely in the short term. Amendments to the act and provisions that are tailor made to target specific states and their issues seem to be the only way forward. The issue is political and requires a political solution. “If AFSPA is to be loosened, the army’s concerns must be assuaged. Key parties in J&K, and the main national parties, must reassure the army that the re-imposition of AFSPA will not be politicised.”¹⁷ There is no point making the armed forces the fall guy for political debacles.

However the armed forces need to restructure their approach to operations in states where people are increasingly and rightly developing zero tolerance to human rights violations. The UN Special Rapporteur on Human Rights in her report has called for a repeal of AFSPA.¹⁸ Both the Indian state and its armed forces do not need additional international involvement in what is an already

15. See Transcript of interview Nitin Gokhale, Strategic Affairs Editor, NDTV 24x7; speaking at a Seminar on “Perception Management for Indian Army” held by the Centre for Land Warfare Studies (CLAWS) in New Delhi on 21 February 2012, accessed on URL: http://www.claws.in/index.php?action=master&task=1092&u_id=36

16. See Transcript of interview of Senior Journalist Ifthikar Gilani, speaking at a Seminar on “Perception Management for Indian Army” held by the Centre for Land Warfare Studies (CLAWS) in New Delhi on 21 February 2012, accessed on URL: http://www.claws.in/index.php?action=master&task=1092&u_id=36

17. “Reassure the Army on AFSPA”; Ajai Shukla, Business Standard, 13 December 2011, accessed on URL: <http://ajaiashukla.blogspot.in/2011/12/reassure-army-on-afspa.html>

18. “UN rights rapporteur recommends AFSPA repeal”, *Hindustan Times*, 10 March 2012, accessed on URL: <http://www.hindustantimes.com/India-news/Srinagar/UN-rights-rapporteur-recommends-Afspa-repeal/Article1-823428.aspx>

complex situation. Winning hearts and minds forms the bedrock of counter-insurgency operations and mere lip service will not suffice. The outreach has to be extended and its voice has to be heard. "Military shyness" is no longer an option. The armed forces need an urgent perception make over, and they need to start now.

RECOMMENDATIONS: THE WAY FORWARD

The preceding papers have provided varied perspectives of the Armed Forces Special Powers Act (AFSPA). The papers were meant to familiarise readers with the relevant facets and nuances of the law and more importantly, the ongoing debate. On the basis of these it would be reasonable to arrive at two unmistakable conclusions.

The aspect of human rights has shaped the AFSPA debate to a large extent. It needs to be emphasised that human rights compliance and operational effectiveness are not contrarian requirements. In fact, adherence to human rights norms and principles, strengthens the counter insurgency capability of a force. The Indian army has been recognised as an apolitical, secular and professional force by the country. Therefore, compliance with humanitarian principles will go a long way in strengthening this faith.

The suggestions that follow are in the form of policy options, in the backdrop of the papers presented. These can either be incorporated in the form of amendments to the existing law or in a new one, given the psychological imperatives and perceptions associated with it.

Armed Forces Imperative

- Any force that operates in a counter terrorism environment, and in the case of J&K, superimposed by a proxy war, needs protection. The Criminal Procedure Code (CrPC) provides protection under Sec 45 and 197 as does the Unlawful Activities

(Prevention) Act 1967, amended in 2008 under Section 49. Therefore, any future amendment, needs to cater for the protection of the armed forces operating in a disturbed area.

Accountability and Responsibility

- Protection for the armed forces must be accompanied by provisions that ensure responsibility and accountability, within the parameters of law. It is for this reason that robust safeguards need to be incorporated in the existing or any new law. Specific suggestions could include:
 - Incorporation of existing Dos and Don'ts in AFSPA. These have since been formalised by the Supreme Court.(List of Dos and Don'ts approved by the Supreme Court attached at Annexure II)
 - Include a provision for the government to amend rules of engagement based on the evolving situation.
 - Create committees at the district level with representatives of army, police, civil administration and the public to report, assess and track complaints in the area.
 - All investigations should be time bound. Reasons for delay, should be communicated to the aggrieved.
 - There is a need to keep detailed records of operations, to ensure suitable proof of conduct of forces and operational imperatives. The provision of technological capability for facilitating the same should be considered.
 - All old cases of human rights violations should be fast tracked and judgments communicated to the aggrieved.

Amendment to the Law

- The changing nature of CI operations must take into account the nature of threat and calibrate the use of force accordingly. A lower threshold cannot justify excessive force. The army's principle of minimum force must therefore remain a fundamental guideline for conduct of operations and should be included in AFSPA.
- The lacunae in the Act, as a result of definitional voids with respect to terms like "disturbed", "dangerous" and "land forces" need to be amplified to ensure greater clarity.

- The language and context of law becomes questionable, because of flawed elucidation of certain terms. Amongst the foremost is, “fire upon or otherwise use force, even to the causing of death.” Suitable amendments need to be incorporated to correct similar objectionable textual and contextual anomalies in the law.
- AFSPA should be made compliant with international and national norms of human rights and humanitarian law.

Armed Forces Public Interface

- Greater transparency in communicating the status of existing cases to include its display on the army and government’s web sites.
- Proactive feedback to petitioners on action taken by the government in past human rights cases.

ANNEXURES

ANNEXURE I
ARMED FORCES (SPECIAL POWERS) ACT, 1990

The Gazette of India
EXTRAORDINARY

PART II-Section 1

PUBLISHED BY AUTHORITY

NEW DELHI, TUESDAY, SEPTEMBER 11, 1990/
BHADRA 20, 1912

MINISTRY OF LAW AND JUSTICE

(Legislative Department)

New Delhi, the 11th September, 1990/Bhadra 20, 1912 (Saka)

The following Act of Parliament received the assent of the President on the 10th September 1990, and is hereby published for general information:

THE ARMED FORCES (JAMMU AND KASHMIR)

SPECIAL POWERS ACT, 1990

No. 21 of 1990

[10th September, 1990.]

An Act to enable certain special powers to be conferred upon members of the armed forces in the disturbed areas in the State of Jammu and Kashmir.

BE it enacted by Parliament in the Forty-first Year of the Republic of India as follows:

1. Short title, extent and commencement. (1) This Act may be called the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990.

(2) It extends to the whole of the State of Jammu and Kashmir.

(3) It shall be deemed to have come into force on the 5th day of July, 1990.

2. Definitions. In this Act, unless the context otherwise requires,—

- (a) “armed forces” means the military forces and the air forces operating as land forces and includes any other armed forces of the Union so operating
- (b) “disturbed area” means an area which is for the time being declared by notification under section 3 to be a disturbed area;
- (c) all other words and expressions ‘used herein, but not defined and defined in the Air Force Act, 1950,¹ or the Army Act, 1950,² shall have the meanings respectively assigned to them in those Acts.

3. Power to declare areas to be disturbed areas. If, in relation to the State of Jammu and Kashmir, the Governor of that State or the Central Government, is of opinion that the whole or any part of the State is in such a disturbed and dangerous condition that the use of armed forces in aid of the civil power is necessary to prevent—

- (a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;
- (b) activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution of India, the Governor of the State or the Central Government, may, by notification in the Official Gazette, declare the whole or any part of the State to be a disturbed area.

Explanation.—In this section, “terrorist act” has the same

1. 45 of 1950.

2. 46 of 1990.

meaning as in Explanation to article 248 of the Constitution of India as applicable to the State of Jammu and Kashmir.

4. Special powers of the armed forces. Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,—

- (a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of firearms, ammunition or explosive substances;
- (b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence;
- (c) arrest, without warrant, any persons who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;
- (d) enter and search, without warrant, any premises to make any such arrest as aforesaid or to recover any person believed to be wrongful restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawful kept in such premises, and may for that purpose use such force as may be necessary, and seize any such property, arms, ammunition or explosive substances;
- (e) stop, search and seize any vehicle or vessel reasonably suspected to be carrying any person who is a proclaimed offender, or any persons who has committed a non-cognizable offence, or against whom a reasonable suspicion

exists that he has committed or is about to commit a non-cognizable offence, or any person who is carrying any arms, ammunition or explosive substance believed to be unlawfully held by him, and may, for that purpose, use such force as may be necessary to effect such stoppage, search or seizure, as the case may be.

5. Power of search to include powers to break open locks, etc.

Every person making a search under this Act shall have the power to break open the lock of any door, almirah, safe, box, cupboard, drawer, package or other thing, if the key thereof is withheld.

6. Arrested persons and seized property to be made over to the police. Any person arrested and taken into custody under this Act and every property, arms, ammunition or explosive substance or any vehicle or vessel seized under this Act, shall be made over to the officer-in-charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest, or as the case may be, occasioning the seizure of such property, arms, ammunition or explosive substance or any vehicle or vessel, as the case may be.

7. Protection of persons acting in good faith under this Act.

No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

8. Repeal and saving. (1) The Armed Forces (Jammu and Kashmir) Special Powers Ordinance, 1990,³ is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

V.S. RAMA DEVI,
Secy. to the Govt. of India

3. 3 of 1990.

CORRIGENDA

In the Constitution (Sixty-sixth Amendment) Act, 1990 as published in the Gazette of India, Extraordinary, Part II, Section 1, dated the 7th June, 1990 (Issue No.32),—

At page 1, in second line from the bottom, for “Regulation, 1963 (Andhra Pradesh Regulation 2 of” read “Regulation, 1970 (Andhra Pradesh Regulation 1 of”.

At page 2, in line 7, for “(Bihar Act 8 of 1985)” reads “(Bihar Act 8 of 1885)”.

EXTRAORDINARY

THE

JAMMU & KASHMIR GOVERNMENT GAZETTE

Vol. 103] Srinagar, Fri., the 6th July, 90/15th Asa., 1912. [No.14-1

PART I-B

Jammu and Kashmir Government—Notifications.

.....

GOVERNMENT OF JAMMU AND KASHMIR,
CIVIL SECRETARIAT—HOME DEPARTMENT.

SRO NO. SW 4

Dated 6-7, 1990

In exercise of the powers conferred under section 3 of the Armed Forces (Jammu and Kashmir) Special Powers Ordinance, 1990, the Governor of Jammu and Kashmir hereby notifies the areas given in the Schedule to this notification as Disturbed Areas.

(Sd.).....

Additional Chief Secretary (Home),
Jammu and Kashmir Government.

.....

SCHEDULE

1. Areas falling within 20 Kms. of the Line of Control in the Districts of Rajouri and Poonch.
2. Districts of Anangtnag, Baramulla, Badgam, Kupwara, Pulwama and Srinagar.

(Sd.).....

Additional Chief Secretary (Home),
Jammu and Kashmir Government.

Government of Jammu and Kashmir

Civil Secretariat Home Department

NOTIFICATION

SRINAGAR, THE 10TH AUSUGT, 2001

SRO 351: Whereas the Governor is of the opinion that the State is in such a disturbed condition that the use of Armed Forces in the aid of civil power is necessary to prevent the activities involving terrorists acts directed towards striking terror in the people;

Now, therefore, in exercise of the powers conferred by section 3 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, the Governor hereby declares the districts of Jammu, Kathu, Udhampur, Poonch, Rajouri and Doda to be disturbed areas in addition to districts, Srinagar, Budgam, Anantnag, Pulwama, Baramulla and Kupwara which stand already so declared.

By order of the Governor

Principal Secretary to Government
Home Department

NO: Home-219/97-ISA dated 10.8.2001.

Copy for information to :

1. Chief Secretary, J&K, Srinagar.
2. Secretary, Ministry of Home Affairs, Govt. of India, New Delhi.
3. Secretary, Ministry of Defence, Govt. of India, New Delhi.
4. Joint Secretary (K-I), MHA (Deptt. of J&K Affairs), New Delhi.
5. Principal Secretary to HE the Governor.

6. Principal Secretary to Hon'ble Chief Minister.
7. Commr/Secretary, Law.
8. Director General Police, Srinagar.
9. Director General, BSF, New Delhi.
10. Director General, ITBP, New Delhi.
11. Director General, CRPF, New Delhi.
12. GOC, XVI Corps C/o 56 APO
13. GOC, XV Corps C/o 56 APO
14. GOC, XIV Corps C/o 56 APO
15. Divisional Commissioner, Jammu.
16. Director Information, J&K, Srinagar.
17. All District Magistrates of Jammu Division.
18. All District Superintendents of Police, Jammu Division.
19. Pvt. Secretary to Hon'ble MOS(Home)

Auth: http://mha.nic.in/pdfs/Armed%20forces%20_J&K_%20Spl.%20powers%20act,%201990.pdf, accessed on 09 Jul 2012.

ANNEXURE II

LIST OF DOS AND DON'TS DIRECTED BY SUPREME COURT

Dos

1. Action before Operation

- (a) Act only in the area declared 'Disturbed Area' under Section 3 of the Act.
- (b) Power to open fire using force or arrest is to be exercised under this Act only by an officer/JCO/WO and NCO.
- (c) Before launching any raid/search, definite information about the activity to be obtained from the local civil authorities.
- (d) As far as possible coopt representative of local civil administration during the raid.

2. Action during Operation

- (a) In case of necessity of opening fire and using any force against the suspect or any person acting in contravention of law and order, ascertain first that it is essential for maintenance of public order. Open fire only after due warning.
- (b) Arrest only those who have committed cognizable offence or who are about to Commit cognizable offence or against whom a reasonable ground exists to prove that they have committed or are about to commit cognizable offence.
- (c) Ensure that troops under command do not harass innocent people, destroy property of the public or unnecessarily enter into the house/dwelling of people not connected with any unlawful activities.
- (d) Ensure that women are not searched/arrested without the

presence of female police. In fact women should be searched by female police only.

3. Action after Operation

- (a) After arrest prepare a list of the persons so arrested.
- (b) Hand over the arrested persons to the nearest police station with least possible delay.
- (c) While handing over to the police a report should accompany with detailed circumstances occasioning the arrest.
- (d) Every delay in handing over the suspects to the police must be justified and should be reasonable depending upon the place, time of arrest and the terrain in which such person has been arrested. Least possible delay may be 2-3 hours extendable to 24 hours or so depending upon a particular case.
- (e) After raid make out a list of all arms, ammunition or any other incriminating material/document taken into possession.
- (f) All such arms, ammunition, stores etc. should be handed over to the police station along with the seizure memo.
- (g) Obtain receipt of persons and arms/ammunition, stores etc. so handed over to the police.
- (h) Make record of the area where operation is launched having the date and time and the persons participating in such raid.
- (i) Make a record of the commander and other officers/JCOs/NCOs forming part of such force.
- (k) [sic] Ensure medical relief to any person injured during the encounter, if any person dies in the encounter his dead body be handed over immediately to the police along with the details leading to such death.

4. Dealing with Civil Court

- (a) Directions of the High Court/Supreme Court should be promptly attended to.

- (b) Whenever summoned by the courts, decorum of the court must be maintained and proper respect paid.
- (c) Answer questions of the court politely and with dignity.
- (d) Maintain detailed record of the entire operation correctly and explicitly.

Don'ts

1. Do not keep a person under custody for any period longer than the bare necessity for handing over to the nearest police station.
2. Do not use any force after having arrested a person except when he is trying to escape.
3. Do not use third-degree methods to extract information or to extract confession or other involvement in unlawful activities.
4. After arrest of a person by the member of the armed forces, he shall not be interrogated by the member of the armed force.
5. Do not release the person directly after apprehending on your own. If any person is to be released, he must be released through civil authorities.
6. Do not tamper with official records.
7. The armed forces shall not take back a person after he is handed over to civil police.

List of Dos and Don'ts while Providing Aid to Civil Authority

Dos

1. Act in closest possible communication with civil authorities throughout.
2. Maintain inter-communication if possible by telephone/radio.
3. Get the permission/requisition from the Magistrate when present.
4. Use little force and do as little injury to person and property as may be consistent with attainment of objective in view.
5. In case you decide to open fire:
 - (a) Give warning in local language that fire will be effective;
 - (b) Attract attention before firing by bugle or other means;

- (c) Distribute your men in fire units with specified Commanders;
 - (d) Control fire by issuing personal orders;
 - (e) Note number of rounds fired;
 - (f) Aim at the front of crowd actually rioting or inciting to riot or at conspicuous ringleaders, i.e., do not fire into the thick of the crowd at the back;
 - (g) Aim low and shoot for effect;
 - (h) Keep Light Machine Gun and Medium Gun in reserve;
 - (i) Cease firing immediately once the object has been attained;
 - (j) Take immediate steps to secure wounded.
6. Maintain cordial relations with civilian authorities and paramilitary forces.
 7. Ensure high standard of discipline.

Don'ts

8. Do not use excessive force
9. Do not get involved in hand-to-hand struggle with the mob
10. Do not ill-treat anyone, in particular, women and children
11. No harassment of civilians
12. No torture
13. No communal bias while dealing with civilians
14. No meddling in civilian administration affairs
15. No Military disgrace by loss/surrender of weapons
16. Do not accept presents, donations and rewards

Auth: [http://www.upr-info.org/IMG/pdf COHR_IND_UPR_S1_2008anx_Annex_XXII_AI_Breifing_on_AFSPA_in_Manipur.pdf](http://www.upr-info.org/IMG/pdf_COHR_IND_UPR_S1_2008anx_Annex_XXII_AI_Breifing_on_AFSPA_in_Manipur.pdf)
accessed on 09 Jul 2012

ANNEXURE III
EXTRACT OF JUDGMENT IN NAGA PEOPLE'S
MOVEMENT OF HUMAN RIGHTS ETC. ETC. VS
UNION OF INDIA

In the light of the above discussion we arrive at the following conclusions:

- (1) Parliament was competent to enact the Central Act in exercise of the legislative power conferred on it under Entry 2 of List I and Article 248 read with Entry 97 of List I. After the insertion of Entry 2A in List I by the Forty-Second Amendment to the Constitution, the legislative power of Parliament to enact the Central Act flows from Entry 2A of List I. It is not a law in respect of maintenance of public order falling under Entry 1 of list II.
- (2) The expression "in aid of the civil power" in Entry 2A of List I and in Entry 1 of List II implies that deployment of the armed forces of the Union shall be for the purpose of enabling the civil power in the State to deal with the situation affecting maintenance of public order which has necessitated the deployment of the armed forces in the State.
- (3) The word "aid" postulates the continued existence of the authority to be aided. this would mean that even after deployment of the armed forces the civil power will continue to function.
- (4) The power to make a law providing for deployment of the armed forces of the Union in aid of the civil power of a State does not include within its ambit the power to enact a law which would enable the armed forces of the Union to

supplant or act as a substitute for the civil power in the State. The armed forces of the Union would operate in the State concerned in co-operation with the civil administration so that the situation which has necessitated the deployment of armed forces is effectively dealt with and normalcy is restored.

- (5) The Central Act does not displace the civil power of the state by the armed forces of the Union and it only provides for deployment of armed forces of the Union in aid of the Civil Power.
- (6) The Central Act cannot be regarded as a colourable legislation or a fraud on the Constitution. It is not a measure intended to achieve the same result as contemplated by a Proclamation of Emergency under Article 352 or a proclamation under Article 356 of the Constitution.
- (7) Section 3 of the Central Act does not confer an arbitrary or unguided power to declare an area as a "disturbed area" for declaring an area as a "disturbed area" under Section 3 there must exist a grave situation of law and order on the basis of which the Governor/Administrator of the State/Union Territory of the Central Government can form an opinion that the area is in such a disturbed or dangerous condition that the use of the armed forces in aid of the civil power is necessary.
- (8) A declaration under Section 3 has to be for a limited duration and there should be periodic review of the declaration before the expiry of six months.
- (9) Although a declaration under Section 3 can be made by the Central Government suo moto without consulting the concerned State Government, but it is desirable that the State Government should be consulted by the Central Government while making the declaration.
- (10) The conferment of the power to make a declaration under Section 3 of the Central Act on the Governor of the State cannot be regarded as delegation of the power of the Central Government.
- (11) The conferment of the power to make a declaration under

Section 3 of the Central Act on the Central Government is not violative of the federal scheme envisaged by the Constitution.

- (12) The provisions contained in Sections 130 and 13 Cr.P.C. cannot be treated as comparable and adequate to deal with the situation requiring the use of armed forces in aid of civil power as envisaged by the Central Act.
- (13) The Powers conferred under clauses (a) to (d) of Section 4 and Section 5 of the Central Act on the officers of the armed forces, including a non-Commissioned Officer are not arbitrary and unreasonable and are not violative of the provisions of Articles 14,19 or 21 of the Constitution.
- (14) While exercising the powers conferred under Section 4(a) of the Central Act, the officer in the armed forces shall use minimal force required for effective action against the person/persons acting in contravention of the prohibitory order.
- (15) A person arrested and taken into custody in exercise of the powers under Section 4(c) of the Central Act should be handed over to the officer-in-charge of the nearest police station with least possible delay so that he can be produced before nearest magistrate within 24 hours of such arrest excluding the time taken for journey from the place of arrest to the court of magistrate.
- (16) The property or the arms, ammunitions, etc. seized during the course of search conducted under Section 4(d) of the Central Act must be handed over to officer-in-charge of the nearest police station together with a report of the circumstances occasioning such search and seizure.
- (17) The provisions of Cr.P.C. governing search and seizure have to be followed during the course of search and seizure conducted in exercise of the powers conferred under Section 4(d) of the Central Act.
- (18) Section 6 of the Central Act in so far as it confers a discretion on the Central Government to grant or refuse sanction for instituting prosecution or a suit or proceeding against any person in respect of anything done or purported to be done

in exercise of the powers conferred by the Act does not suffer from the vice of arbitrariness. Since the order of the Central Government refusing or granting the sanction under Section 6 is subject to judicial review, the Central Government shall pass an order giving reasons.

- (19) While exercising the powers conferred under clauses (a) to (d) of Section 4 the officers of the armed forces shall strictly follow the instructions contained in the list of "Do's and Don'ts" issued by the army authorities which are binding and any dis-regard to the said instructions would entail suitable action under the Army Act, 1950.
- (20) The instructions contained in the list of "Do's and Don'ts" shall be suitably amended so as to bring them in conformity with the guidelines contained in the decisions of this Court and to incorporate the safeguards that are contained in clauses (a) to (d) of Section 4 and Section 5 of the Central Act as construed and also the direction contained in the order of this Court dated July 4, 1991 in Civil Appeal No. 2551 of 1991.
- (21) A complaint containing an allegation about misuse or abuse of the powers conferred under the Central Act shall be thoroughly inquired into and, if on enquiry it is found that the allegations are correct, the victim should be suitably compensated and the necessary sanction for institution of prosecution and/or a suit or other proceeding should be granted under Section 6 of the Central Act.
- (22) The State Act is, in pith and substance, a law in respect of maintenance of public order enacted in exercise of the legislative power conferred on the State Legislature under Entry 1 of List II.
- (23) The Expression "or any officer of the Assam Rifles not below the rank of Havildar" occurring in Section 4 and the expression "or any officer of the Assam Rifles not below the rank of Jamadar" in Section 5 of the State Act have been rightly held to be unconstitutional by the Delhi High Court since Assam Rifles are a part of the armed forces of the Union and the State Legislature in exercise of its power under Entry

of List II was not competent to enact a law in relation to armed forces of the Union.

- (24) The rest of the provisions of Sections 4 and 5 of the State Act are not open to challenge under Article 254 of the Constitution on the ground of repugnance to the provisions contained in Cr.P.C. and the Arms Act.
- (25) The considerations governing the exercise of the powers conferred under Sections 3 to 6 of the Central Act indicated above will also apply to exercise of powers conferred under Sections 3 to 6 of the State Act.
- (26) The directions Nos. (i) and (ii) given by the Gauhati High Court in its judgment dated March 20, 1991 cannot be sustained and must be set aside.

Auth: Supreme Court of India, Naga People's movement of Human Rights etc vs Union of India, 27 Nov 1997, <http://judis.nic.in>, pp 34-38, accessed on 16 November 2011.

ANNEXURE IV

EXTRACTS OF JUSTICE JEEVAN REDDY COMMITTEE REPORT

5. Keeping in view the material placed before us and the impressions gathered by the Committee during the course of its visits and hearings held within and outside the North-Eastern States, the Committee is of the firm view that:

- (a) The Armed Forces (Special Powers) Act, 1958 should be repealed. Therefore, recommending the continuation of the present Act, with or without amendments, does not arise. The Act is too sketchy, too bald and quite inadequate in several particulars. It is true that the Hon'ble Supreme Court has upheld its constitutional validity but that circumstance is not an endorsement of the desirability or advisability of the Act. When the constitutional validity of an enactment is challenged in a Court, the Court examines (i) whether the Act is within the legislative competence of the Legislature which enacted it and (ii) whether the enactment violates any of the provisions of the Constitution. The Court does not—it is not supposed to—pronounce upon the wisdom or the necessity of such an enactment. It must be remembered that even while upholding its constitutional validity, the Hon'ble Court has found it fit and necessary not merely to approve the "Dos and Don'ts" in the instructions issued by the Army Headquarters from time to time but has also added certain riders of its own viz., those contained in clauses 8, 9 and 14 to 21 in para 74 of its judgment (at pages 56 and 157 of the judgment in NAGA PEOPLES' MOVEMENT OF HUMAN

RIGHTS vs. UNION OF INDIA, (1998) 2 SCC 109). The Committee is of the opinion that legislative shape must be given to many of these riders. We must also mention the impression gathered by it during the course of its work viz., the Act, for whatever reason, has become a symbol of oppression, an object of hate and an instrument of discrimination and highhandedness. It is highly desirable and advisable to repeal this Act altogether, without, of course, losing sight of the overwhelming desire of an overwhelming majority of the region that the Army should remain (though the Act should go). For that purpose, an appropriate legal mechanism has to be devised.

- (b) The Committee is also of the firm view that it would be more appropriate to recommend insertion of appropriate provisions in the Unlawful Activities (Prevention) Act, 1967 (as amended in the year 2004)—which is a cognate enactment as pointed out in Chapter III Part II of this Report instead of suggesting a new piece of legislation.

6. The reasons for adopting the course of introducing requisite and appropriate provisions in the Unlawful Activities (Protection) Act are as follows:

- (1) The ULP Act defines “terrorism” in terms which encompass and cover the activities of the nature carried on by several militant/insurgent organisations in the North-east States. Use of arms and/or explosives so as to cause loss of life or property or to act against a government servant, with intent either to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country (as provided by Section 15), the kind of activity carried on by various militant/insurgent organisations in the North-east, falls within, the four corners of Section 15. It is terrorism within the meaning of the Act.
- (2) The ULP Act not only defines ‘terrorism’ in expansive terms but also specifically lists some of the organizations engaged in militant/insurgent activity in Manipur, Tripura, Nagaland and Assam as terrorist organizations in the schedule appended to the Act. In other words, the Act

recognizes that the activities carried on by the schedule mentioned organizations fall within the definition of 'terrorism' and 'terrorist activity' as defined by the said Act. Furthermore, as pointed out in Chapter III of Part II of this Report, the ULP Act does contemplate, by necessary implication, the use of armed forces of the Union as well as the other para military forces under the control of the Union to fight and curb the terrorist activities in the country. It is for the said reason that it has expressly barred, in Section 49, any suit, prosecution or other legal proceedings against "any serving or retired member of the armed forces or para military forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism". In this sense the ULP Act, as it now obtains, does provide for deploying the armed forces or para-military forces for fighting the militant/insurgent/terrorist activity being carried on in some or all North-eastern States.¹ The Act is designed to curb the terrorist activities of not only the organisations mentioned in the schedule but any and every terrorist activity.

- (3) A major consequence of the proposed course would be to erase the feeling of discrimination and alienation among the people of the North-eastern States that they have been subjected to, what they call, "draconian" enactment made especially for them. The ULP Act applies to entire India including to the North-eastern States. The complaint of discrimination would then no longer be valid.
- (4) The ULP Act is a comprehensive law designed to (i) ban unlawful organisations; (ii) to curb terrorist activities and the funding of terrorism; and (iii) investigation, trial and punishment of persons indulging in terrorist acts, unlike the Armed Forces (Special Powers) Act which deals only with the operations of the armed forces of the Union in a

1. As a matter of fact, it can be said that there are two enactments for fighting militant/insurgent /terrorist organizations, groups and gangs in the North-eastern States viz., the Armed Forces (Special Powers) Act whose application is limited to the North-eastern States alone and the ULP Act which extends to the whole of India including the North-eastern States.

disturbed area. After the proposed amendments, ULP Act would be more comprehensive in the sense that it would expressly permit deployment of armed forces and para-military forces of the Union to achieve its object viz., curbing terrorism. In other words, operations of the armed forces of the Union would be one of the ways of curbing terrorism. It would also mean that persons apprehended by the armed forces of the Union would be made over immediately to the nearest police station and would be tried in accordance with the procedural laws of the land. The prosecution too would be quicker and more effective because of the special provisions contained in Sections 44 (protection of witnesses) and 46 (admissibility of evidence collected through interception of communications). At the same time, the accused would also get the very important safeguard contained in Section 45 of the Act which provides that no court shall take cognizance of any offence under the Act unless previous sanction therefor is granted by the appropriate government, in case the prosecuting agency proposes to proceed against him for any offence in Chapter IV or Chapter VI of this Act. We may clarify that in law it lies within the discretion and judgment of the investing officer to decide, after due investigation, whether to proceed against the accused or to drop the proceedings and in case, he decides to proceed against the witness, the determine the offence with which the accused is to be charged. In short, just because, a person is arrested by the armed forces acting under this Act, and is made over to the police, the police is not bound to proceed against him only for offences under this Act, the police is free, depending upon the evidence/material gathered during investigation, to file a charge sheet for offence under this Act or under IPC or such other appropriate enactment, as may be applicable.

7. As stated hereinabove, the ULP Act does contemplate, by necessary implication, use of armed forces or para-military forces to conduct operations and to take steps to fight and curb terrorism. It does not, however, contain any provision specifying their powers,

duties and procedures relevant to their deployment. It does not also provide for an internal mechanism ensuring accountability of such forces with a view to guard against abuses and excesses by delinquent members of such forces. It is this lacuna, which is to be supplied by inserting appropriate provisions in the ULP Act. The provisions so introduced should be clear, unambiguous and must specify the powers of the armed forces/para military forces while acting to curb terrorist/insurgent activities.

8. We may also refer in this connection to the necessity of creating a mechanism, which we may designate as the "Grievances Cell"- Over the years many people from the region have been complaining that among the most difficult issues is the problem faced by those who seek information about family members and friends who have been picked up and detained by armed forces or security forces. There have been a large number of cases where those taken away without warrants have "disappeared", or ended up dead or badly injured. Suspicion and bitterness have grown as a result. There is need for a mechanism which is transparent, quick and involves authorities from concerned agencies as well as civil society groups to provide information on the whereabouts of missing persons within 24 hours.

9. To ensure public confidence in the process of detention and arrest, grievances cells are proposed to be set up in each district where armed forces are deployed. These cells will receive complaints regarding allegations of missing persons or abuse of law by security/armed forces, make prompt enquiries and furnish information to the complainant. Where, however, the complainant is not satisfied with the information furnished and is prepared to file an affidavit in support of his allegation, it shall be competent for the Cell to call upon the State level head of the concerned force or organization to enquire into the matter and report the same to the cell as early as possible, not exceeding in any event, one week. The State level officers from whom these Grievances Cells seek information shall immediately make necessary enquiries and furnish full and correct information to the Grievances Cell as early as possible, not exceeding in any event one week. The Grievances Cells will be composed of three persons, namely, a senior member of the local administration

as its chair, a Captain of the armed forces/security forces and a senior member of the local police. These will have dedicated communications, authority to obtain information from concerned authorities and have facilities for recording and responding to complaints. They shall locate their offices in the premises of the Sub Divisional Magistrate or in the premises of the District Magistrates, as the case may be. Such a mechanism is absolutely essential to achieve the two equally important purposes viz., (a) to infuse and instill confidence among the citizenry that the State, while deploying the armed forces of the Union to fight insurgency/terrorism has also taken care to provide for steps to guard against abuses/excesses with a view to protect the people and to preserve their democratic and civil rights; and (b) to protect the honour and the fair name of the forces.

11. While deploying the forces under sub-section (3) the Central Government shall, by a notification published in the Gazette, specifying the State or the part of the State in which the forces would operate and the period (not exceeding six months) for which the forces shall operate. At the end of the period so specified, the Central Government shall review the situation in consultation with the State Government and check whether the deployment of forces should continue and if it is to continue for which period. This review shall take place as and when it is found necessary to continue the deployment of the forces at the expiry of the period earlier specified. It shall be permissible for the Central Government to vary the part of the State where the forces are deployed in case the earlier notification is in respect of a part of a State. Every notification extending the period of deployment of forces or varying the area of the State, as the case may be, shall be laid on the table of both the Houses of Parliament within one month of the publication of such notification.

12. A draft of the Bill, which is recommended to be incorporated as Chapter VI A of the Unlawful Activities (Preventive) Act, 1967 is enclosed herewith. The draft bill is meant to serve as a guide in drafting the legislation to be introduced in the Parliament. We may also mention that the Appendix to the draft incorporates the Do's and Don'ts issued by the Army and which have been approved by

the Hon'ble Supreme Court of India in its decision report in Naga People's Movement for Human Rights Vs. Union of India (A.I.R 1998 Supreme Court 431) as well as the additional directions given by the Hon'ble Supreme Court. However, those directions which have been already incorporated in the Bill are not repeated in the Appendix.

13. A separate note submitted by Sri Sanjoy Hazarika, a Member of the Committee, is also enclosed at Annexure-XIV.

Auth: The contents of the report were not made public. However, the extracts provided are based on its publication by *The Hindu*.²

2. *The Hindu*, <http://www.hindu.com/nic/afa/>, accessed on 15 Nov 2011.

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The debate over the Armed Forces (Special Powers) Act (AFSPA), has been raging within affected states, armed forces, central and state police organisations, human rights groups, legal fraternity and the central leadership. There have been different views and opinions voiced based on strongly held beliefs. This monograph attempts to present some of these diverse views, with the aim of capturing the ongoing debate.

Colonel Vivek Chadha (Retired), is a Research Fellow at IDSA. His current areas of research are defence studies, counter insurgency and terrorism finance. His published books include: *Low Intensity Conflicts in India: An Analysis*, *Company Commander in Low Intensity Conflict* and *Indo-US Relations: Divergence to Convergence*.

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